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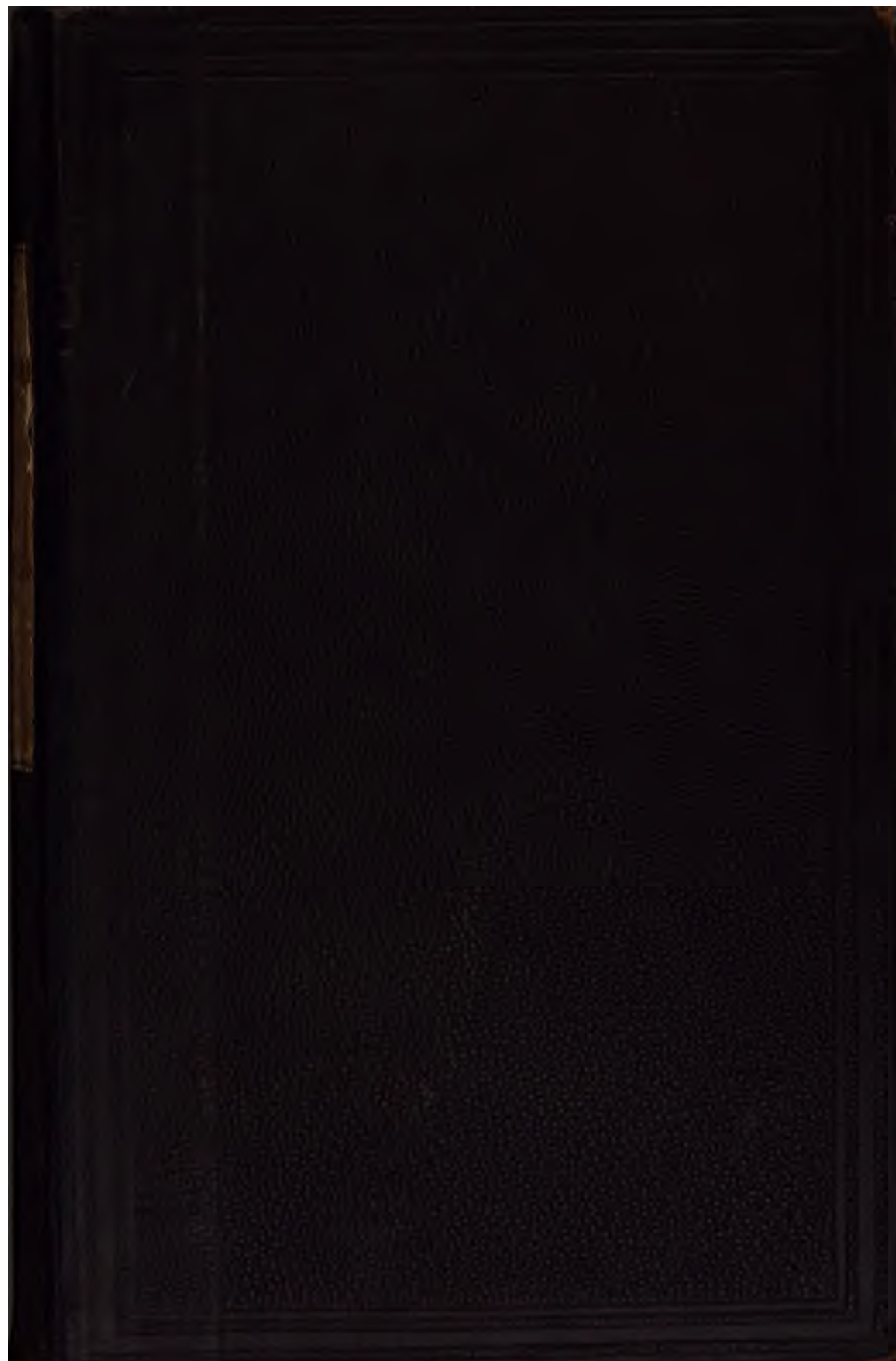
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A TREATISE  
ON THE LAW OF  
SALE OF PERSONAL PROPERTY;  
WITH REFERENCES TO THE  
AMERICAN DECISIONS  
AND TO THE  
FRENCH CODE AND CIVIL LAW.

BY  
J. P. BENJAMIN, Esq.,  
OF LINCOLN'S INN, BARRISTER-AT-LAW.



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## PREFACE.

---

IF the well-known treatise of Mr. Justice Blackburn had been designed by its learned author to embrace the whole law on the subject of sale of goods, nothing further would now be needed by the practitioner than a new edition of that admirable work, incorporating the later statutes and decisions, so as to afford a connected view of the modifications necessarily introduced by lapse of time into the law of a contract so perpetually recurring as that of sale. But unfortunately for the Profession, Blackburn on Sale was intentionally restricted in its scope, and is confined to an examination of the effect of the contract only, and of the legal rights of property and possession in goods.

This treatise is an attempt to develop the principles applicable to all branches of the subject, while following Blackburn on Sale as a model for guidance in the treatment of such topics as are embraced in that work. An

effort has been made to afford some compensation for the imperfections of the attempt, by references to American decisions, and to the authorities in the Civil law, not elsewhere so readily accessible.

TEMPLE,  
*August, 1868.*

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ERRATUM.

In first marginal note at page 466, *for* Executing, *read* Executory.

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# SALE OF PERSONAL PROPERTY.

## BOOK I. FORMATION OF THE CONTRACT.

### PART I. AT COMMON LAW.

#### CHAPTER I. OF THE CONTRACT OF SALE OF PERSONAL PROPERTY, ITS FORM, AND ESSENTIAL ELEMENTS.

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By the common law a sale of personal property is usually termed a "bargain and sale of goods." It may be defined to be a transfer of the *absolute or general* property in a thing for a price in *money*.<sup>1</sup> Hence it follows, that to constitute a valid sale, there must be a concurrence of the following elements, viz.: (1st), Parties competent to contract; (2nd), mutual assent; (3rd), a thing, the absolute or general

Definition of a bargain and sale of goods.

The elements of the contract

<sup>1</sup> Blackstone's definition is, "a transmutation of property from one man to another in consideration of some price." 2 Bl. 446. Kent's is, "a contract for the transfer of property from one person to another for a valuable consideration." 2 Kent, 615, 11th Ed. This definition would include barter, which, though in most respects analogous, is certainly not identical, with sale.



property in which is transferred from the seller to the buyer; and (4th), a price in money paid or promised. That it requires (1st), parties competent to contract, and (2nd), mutual assent, in order to effect a sale, is manifest from the general principles which govern all contracts. The third essential is that there should be a transfer of the *absolute or general* property in the thing sold; for in law, a thing may in some cases be said to have in a certain sense two owners, one of whom has the general, and the other a special property in it; and a transfer of the special property is not a sale of the thing. An illustration of this is presented in the case of *Jenkins v. Brown*,<sup>1</sup> where a factor in New Orleans bought a cargo of corn with his own money, on the order of a London correspondent. He shipped the goods for account of his correspondent, and wrote letters of advice to that effect, and sent invoices to the correspondent, and drew bills of exchange on him for the price, but took bills of lading to his own order, and endorsed and delivered them to a banker to whom he sold the bills of exchange. This transaction was held to be a transfer of the general property to the London merchant, and therefore a sale to him; and a transfer of a special property to the banker by the delivery to him of the bills of lading, which represented the goods.

Price—must  
be money.

So in relation to the element of price. It must be *money*, paid or promised, accordingly as the agreement may be for a cash or a credit sale; but if any other consideration than money be given, it is not a sale. If goods be given in exchange for goods it is a barter. So also goods may be given in consideration of work and labour done, or for rent, or for board and lodging,<sup>2</sup> or any valuable consideration other than money; all of which are contracts for the transfer of the general and absolute property in the thing, but they are not sales of goods. The legal effects of such special contracts, as well as of barter, on the rights of the parties are

<sup>1</sup> 14 Q. B. 496; 19 L. J., Q. B. 286.

<sup>2</sup> See an example in *Keys v. Harwood*, 2 C. B. 905.

generally, but not always, the same as in the case of sales.<sup>1</sup> If no valuable consideration be given for the transfer, it is a gift,<sup>2</sup> not a sale.

By the common law, all that was required to give validity to a sale of personal property, whatever may have been the amount or value, was the mutual assent of the parties to the contract. As soon as it was shown by any evidence, verbal or written, that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for a money price, the contract was completely proven, and binding on both parties. If, by the terms of the agreement, the property in the thing sold passed immediately to the buyer, the contract was termed in the common law "a bargain and sale of goods;" but if the property in the goods was to remain for the time being in the seller, and only to pass to the buyer at a future time, or on the accomplishment of certain conditions, as, for example, if it were necessary to weigh or measure what was sold out of the bulk belonging to the vendor, then the contract was called in the common law an executory agreement. The distinction between a bargain and sale of goods and an executory agreement is the subject of Book II. of this Treatise.

Form at common law.

A very important modification of the common law in respect to a bargain and sale of goods, and to an executory contract, was introduced by the statute 29 Car. II. c. 3, commonly called the Statute of Frauds, and an amendment thereof, the 9 Geo. IV. c. 14, s. 7, which are very fully considered *post*, Book I., Part 2.

Statute of Frauds.

<sup>1</sup> For cases showing distinction between sale and barter, see *Harris v. Fowle*, cited in *Barbe v. Parker*, 1 H. Bl. 287; *Hands v. Burton*, 9 East, 349; *Harrison v. Luke*, 14 M. & W. 139; *Sheldon v. Cox*, 3 B. & C. 420; *Guerreiro v. Peile*, 3 B. & Ald. 616; *Forsyth v. Jervis*, 1 Stark. 437; *Read v. Hutchinson*, 3 Camp. 352.

<sup>2</sup> Parol gifts of personal chattels do not pass the property, if there be no actual delivery to the donee. *Irons v. Smallpiece*, 2 B. & A. 551; *Shower v. Pilok*, 4 Ex. 478.

## CHAPTER II.

### OF THE PARTIES TO THE CONTRACT.

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So far as the general capacity to contract is concerned, and the rules of law relating to persons either totally incompetent to contract, or protected from liability by reason of infancy, coverture, and the like causes, the reader must be referred to treatises which embrace the subject of contracts in general. Such rules and principles as are specially applicable to sales of goods will be examined in this chapter.

#### SECTION I.—WHO MAY SELL.

None but the owner.

In general, no man can sell goods and convey a valid title to them unless he be the owner, or lawfully represent the owner. *Nemo dat quod non habet.*<sup>1</sup> A person, therefore, however innocent, who buys goods from one not the owner, obtains no property in them whatever (except in some

<sup>1</sup> *Peer v. Humphreys*, 2 Ad. & E. 495; *Whistler v. Foster*, 32 L. J., C. P. 161.

special cases presently to be noticed); and even if, in ignorance of the fact that the goods were lost or stolen, he resell them to a third person, in good faith, he remains liable in trover to the original owner, who may maintain his action without prosecuting the felon.<sup>1</sup> But a man may make a valid *agreement to sell* a thing not yet his, and even a thing not yet in existence; this *executory* contract will be examined in the next chapter, which treats of the thing sold.

In general, also, any person competent to contract may sell goods of which he is owner, and convey a perfect title to the purchaser. But if the buyer has notice that any writ, by virtue of which the goods of the vendor might be seized or attached, has been delivered to and remains unexecuted in the hands of the sheriff, under-sheriff, or coroner, the goods purchased by him are liable to seizure in his hands under such writ, by virtue of the statutes 29 Car. II. c. 3, and 19 & 20 Vict. c. 97, s. 1. The delivery of the writ to the sheriff binds the property from the date of delivery, but does not change the ownership; so that the vendor's transfer is valid, but the purchaser takes the goods subject to the rights of the execution creditor.<sup>2</sup> If, however, the purchaser had no notice of the existence of the writ in the sheriff's hands, the first section of the Act 19 & 20 Vict. c. 97, called the "Mercantile Law Amendment Act," protects him, by providing that no such writ "shall prejudice the title to such goods acquired by any person *bona fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ."<sup>3</sup>

Effect of outstanding writ against owner

The first and most important exception to the rule that a man cannot make a valid sale of goods that do not belong

Exceptions to rule that owners only can sell.

<sup>1</sup> *Stone v. Marsh*, 6 B. & C. 551; in its operation, and does not affect *Marsh v. Keating*, 1 Bing. N. C. 198; pre-existing rights. *Williams v. Smith*, 26 L. J., Ex. 371; and in error, 28 L. J., Ex. 286; *Flood v. Patterson*, 30 L. J., Ch. 486; and *Jackson v. Woolley*, 8 E. & B. 778; and 27 L. J. Q. B. 181, 448.

<sup>2</sup> *Woodland v. Fuller*, 11 Ad. & E. 859.

<sup>3</sup> This section is not retrospective

to him, is presented in the case of sales made in *market overt*.

**Market overt.**

**MARKET OVERT** in the country is held on special days, provided by charter or prescription;<sup>1</sup> but in London every day except Sunday is market-day.<sup>2</sup> In the country the only place that is market overt is the particular spot of ground set apart by custom for the sale of particular goods, and this does not include shops; but in London every shop in which goods are exposed publicly to sale is market overt for such goods as the owner openly professes to trade in.<sup>3</sup>

As a London shop is not a market overt for any goods except such as are usually sold there, it was held in the leading case<sup>3</sup> that a scrivener's shop was not a market overt for plate, though a goldsmith's would have been. So Smithfield was held not to be a market overt for clothes, but only for horses and cattle;<sup>4</sup> and Cheapside not for horses;<sup>5</sup> and Aldridge's not for carriages.<sup>6</sup>

A wharf is not a market overt, even in the city of London.<sup>7</sup>

In a recent case in the Queen's Bench, the common law doctrine of market overt was much discussed, and the Chief Justice expressed the opinion that a sale could not be considered as made in market overt "unless the goods were exposed in the market for sale, and the whole transaction begun, continued, and completed in the open market; so as to give the fullest opportunity to the man whose goods have been taken to make pursuit of them, and prevent their being sold."<sup>8</sup>

**Sales in market overt that are not valid.**

The exceptions to the validity of sales made in *market overt* by one who is not the owner, and the rules of law

<sup>1</sup> See *Benjamin v. Andrews*, 5 C. B., N. S. 299; 27 L. J., M. C. 810.

<sup>2</sup> Case of market overt, 5 Rep. 83. b.; L'Evesque de Worcester's case, Moore, 360, Poph. 84; Comyn's Dig. "Market" E; 2 Bl. Com. 449; *Lyons v. De Pass*, 11 Ad. & E. 326; *Crane v. The London Dock Company*, 3 L. J., Q. B. 224; S. C., 5 B. & S. 13; *Anon.*, 12 Mod. 521.

<sup>3</sup> 5 Rep. 83 b.

<sup>4</sup> Moore, 360.

<sup>5</sup> *Ib.* See also *Taylor v. Chambers*, Cro. Jac. 68.

<sup>6</sup> *Marnier v. Banks*, C. P. Nov. 1867. See Weekly Notes, 261.

<sup>7</sup> *Wilkinson v. King*, 2 Camp. 335.

<sup>8</sup> *Per Cockburn, C. J.*, in *Crane v. The London Dock Company*, 5 B. & S. 313; 33 L. J., Q. B. 224.

governing the subject, are fully treated by Lord Coke, in 2 Inst. 713, and have been the subject of numerous decisions. A sale in market overt does not give a good title to goods belonging to the sovereign; nor protect a buyer who knew that they were not the property of the seller, or was guilty of bad faith in the transaction. The purchaser is not protected if the sale be made in a covert place, as a back room, warehouse, or shop with closed windows; or between sunset and sunrise; or if the treaty for sale be begun out of market overt. The privilege of market overt does not extend to gifts,<sup>1</sup> nor to sales of pawns taken to any pawnbroker in London, or within two miles thereof;<sup>2</sup> and if the original vendor who sold without title, come again into possession of the goods after any number of intervening sales, the right of the original owner revives.<sup>3</sup>

A sale by sample is not a sale in market overt, and in *Hill v. Smith*,<sup>4</sup> Lord Mansfield said: "All the doctrine of sales in market overt militates against any idea of a sale by sample; for a sale in market overt requires that the commodity should be openly sold and delivered in the market." This decision was approved and followed by the Queen's Bench in *Crane v. the London Dock Company*.<sup>5</sup>

Sale by sample,  
not a sale in  
market overt.

In *Lyons v. De Pass*,<sup>6</sup> a sale was held to be entitled to the privilege of market overt where made in a shop in the City of London to the shopkeeper who dealt in such goods: but the point was not raised, and the existence of the privilege in such a case was strongly questioned by the judges in *Crane v. The London Dock Company*.<sup>5</sup>

Purchase by  
shop-keeper in  
London.  
*Lyons v. De  
Pass*.

The security of a purchaser in market overt who innocently buys stolen goods, is affected by the statute 24 & 25

Where true  
owner prosec-  
utes felon.

<sup>1</sup> 2 Inst. 713; 2 Bl. Com. 499; *Hartop v. Hoare*, 2 Str. 1187; *Wilkinson v. King*, 2 Camp. 335; *Packer v. Gillies*, 2 Camp. 336, note; cases cited in *Crane v. The London Dock Company*, 33 L. J., Q. B. 224; 5 B. & S. 363.

<sup>2</sup> Act 1 Jac. I., c. 21, s. 5. *Hartopp v. Hoare*, 3 Atk. 44.

<sup>3</sup> 2 Bl. Com. 450; 2 Inst. 713; and see *per* Best, J., in *Freeman v. East India Company*, 5 B. & A. 624.

<sup>4</sup> 4 Taunt. 532.

<sup>5</sup> 33 L. J., Q. B. 224; 5 B. & S. 313. See *Bailiffs, &c. of Tewkesbury v. Diston*, 6 East, 438.

<sup>6</sup> 11 Ad. & E. 326.

Vict. c. 96, s. 100, which re-enacts and adds to the 7 & 8 Geo. IV. c. 29, s. 57.<sup>1</sup> By the terms of this section, it is provided that,—“If any person guilty of any such felony or misdemeanor as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the court before whom any person shall be tried for any such felony or misdemeanor, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner.”

It has been settled, that on the true construction of this statute, the property in the chattel becomes re-vested in the original owner upon the conviction of the felon, even though no writ or order of restitution has been made by the court.<sup>2</sup> But an action was held not to be maintainable against an innocent purchaser in market overt, who had disposed of the stolen goods before the conviction of the thief; although he was, while the goods still remained in his possession, notified of the robbery by the original owner.<sup>3</sup>

Owner not bound to prosecute before recovering from innocent third person goods not sold in market overt

It was at one time supposed that where goods had been stolen, an owner could not recover them from an innocent vendee who had bought them, *not* in market overt, until he had done his duty in prosecuting the thief. But the cases of *Gimson v. Woodfall*<sup>4</sup> and *Peer v. Humphreys*<sup>5</sup> were overruled in *White v. Spettigue*,<sup>6</sup> where it was held, on the authority of *Stone v. Marsh*,<sup>7</sup> and *Marsh v. Keating*,<sup>8</sup>

<sup>1</sup> See also 21 Henry VIII., c. 11, and *Parker v. Patrick*, 5 T. R. 175.

<sup>2</sup> *Scattergood v. Sylvester*, 15 Q. B. 506; 19 L. J., Q. B. 447. See also *Peer v. Humphrey*, 2 A. & E. 495.

<sup>3</sup> *Horwood v. Smith*, 2 T. R. 750.

<sup>4</sup> 2 C. & P. 41.

<sup>5</sup> 2 Ad. & E. 495; 4 N. & M. 430.

<sup>6</sup> 13 M. & W. 603.

<sup>7</sup> 6 B. & C. 551.

<sup>8</sup> 1 Bing., N. C. 198.

that the obligation of the plaintiff to prosecute the thief does not apply where the action is against a third party innocent of the felony. And in *Lee v. Bayes*<sup>1</sup> the law was stated to be settled in conformity with the decision in *White v. Spettigue*.<sup>2</sup>

For more than three centuries it has been found necessary to make special provision in relation to the sale of *horses* in market overt, on account of the peculiar facility with which these animals, when stolen, can be removed from the neighbourhood of the owner and disposed of in markets and fairs.

Sale, horses in  
market overt.

The statute of 2 & 3 P. & M. c. 7, passed in 1555, and that of 31 Eliz. c. 12, in 1589, contain the rules and regulations applicable to this subject. The principal provisions of the first statute are, that there shall be a certain special place appointed and limited out in all fairs and markets overt where horses are sold; that a toll-keeper shall be appointed to keep this place from ten o'clock in the morning until sunset, and he shall take the tolls for all horses at that place and within those hours, and not at any other time or place: that the parties to the bargain shall be before him present when he takes the toll: and that he shall write in a book to be kept for that purpose, the names, surnames, and dwelling-places of the parties, and a full description of the animal sold. The property in the horse is not to pass to the buyer, unless the animal be openly exposed for one hour at least at the place and within the hours above specified; and unless the parties come together and bring the animal to the toll-keeper or book-keeper (where no toll is paid), and have the entries properly made in the book. By the second statute, it is required that the toll-keeper or book-keeper shall take upon himself "perfect knowledge" of the vendor, and "of his true Christian name, surname, and place of dwelling or residency;" or that the vendor shall bring to the keeper one sufficient and creditable person that can testify that he knows the vendor, and in such case the name and residence of the person so testifying, as well as those of the

<sup>1</sup> 18 C. B. 599.

<sup>2</sup> 13 M. & W. 603.



vendor, are to be recorded in the book, and the "very true price or value" given for the horse; and in case of failure to comply with these provisions, the sale is to be void. The Act also provides that the original owner may take back his horse from the purchaser, even when the sale has been regularly made in market overt according to the rules laid down in the statute, on repayment to the purchaser of the price paid by him, provided the demand on the purchaser be made within six months from the date of the felony.

The decisions on these two statutes are collected in Bacon's Abr. Fairs and Markets, and in Com. Dig. Market, E. Their provisions have been found so effective in putting an end to the mischief which they were intended to prevent, that there are very few modern cases on the subject.<sup>1</sup>

Horse repository outside of London not market overt.

In *Lee v. Bayes*,<sup>1</sup> it was held that the sale of a horse at auction in a repository out of the City of London, was not a sale in market overt, Jervis, C.J., saying that market overt was "an open, public, and *legally constituted* market." On the question, What is a legally constituted market? the reader is referred to the case of *Benjamin v. Andrews*,<sup>2</sup> decided in the Common Pleas in 1858.

What is a legally constituted market?

Sale of negotiable securities by one not owner.

The second exception to the rule that one not the owner cannot make a valid sale of personal chattels, also arises out of the 24 & 25 Vict. c. 96, s. 100, already quoted, which directs that—"If it shall appear before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery, by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security: Provided also, that nothing in this section contained shall

<sup>1</sup> See *Joseph v. Adkins*, 2 Stark.      <sup>2</sup> 5 C. B., N. S. 299; 27 L. J., 76; *Lee v. Bayes*, 18 C. B. 599.      M. C. 310.

apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods or documents of title to goods for any misdemeanor against this Act."

This clause was intended to prevent the statute from operating in such manner as to interfere with a settled rule of the law merchant, namely, that one not the owner, even the thief, may make a valid transfer of negotiable instruments, if they are in the usual state in which they commonly pass on delivery from man to man, like coin, according to the usage of trade; provided the buyer has been guilty of no fraud in taking them, for in that case he would be forced to bear the loss.<sup>1</sup>

Another case, in which one not the owner of goods may make valid sale of them, is that of the pawnee. He has the legal power to sell goods pledged to him, if the pawnor make default in payment at the stipulated time; and this he may do without taking any legal proceedings against the pawnor.<sup>2</sup> Sale by pawnee.

The sheriff, as an officer on whom the law confers a power, may sell the goods of the defendant in execution, and confer a valid title on the purchaser; and this title will not be affected, although the writ of execution be afterwards set aside.<sup>3</sup> By public officers.

This protection, however, was held by the Court of

<sup>1</sup> *Grant v. Vaughan*, 3 Burr. 1516; *Lang v. Smith*, 7 Bing. 284; *Gagier v. Mievill*, 3 B. & Cr. 35; *Crook v. Jadia*, 5 B. & Ad. 909; *Blackhouse v. Harrison*, 5 B. & Ad. 1105; *Bank of Bengal v. M'Leod*, 7 Moore, P. C. 35; *Goodman v. Harvey*, 4 Ad. & El. 870; *Uther v. Rich*, 10 Ad. & E. 784; *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J., C. P. 83; *Seal v. Dent*, 8 Moore, P. C. 319; *Gill v. Cubitt*, 3 B. & Cr. 466; *Whistler v. Forster*, 32 L. J., C. P. 161. See also numerous other cases cited in notes to *Miller v. Race*, 1 Sm. Lead. Cas. 468 (Ed. 1867); *Byles on Bills*, p. 158 (9th Ed.).

<sup>2</sup> *Pothonier v. Dawson*, Holt 385; *Tucker v. Wilson*, 1 P. Williams, 261; *Lockwood v. Ewer*, 9 Mod. 278; *Martin v. Read*, 11 C. B., N. S. 730, and 31 L. J., C. P. 126; *Johnson v. Stear*, 15 C. B., N. S. 830, and 33 L. J., C. P. 130; *Pigot v. Cubley*, 15 C. B., N. S. 701, and 33 L. J., C. P. 134; 1 Smith's L. C. 201.

<sup>3</sup> *Anon.*, Dyer, 363 a., pl. 24; *Turner v. Felgate*, 1 Lev. 95; *Manning's case*, 8 Co. 91; *Doe dem. Emmett v. Thorn*, 1 M. & S. 425; *Doe v. Murlass*, 6 M. & S. 110; *Farrant v. Thompson*, 5 B. & Ald. 826; *Lock v. Sellwood*, 1 Q. B. 736.

Queen's Bench not to be available in favour of a purchaser of goods distrained under a warrant issued by two justices of the peace to the constable, *where the warrant was on the face of it illegal*.<sup>1</sup>

Masters of  
ships.

Another instance of the power of one who is not owner to transfer the property in goods held in his possession, is that of the master of a vessel, who is vested by law with authority to sell the goods of the shippers of the cargo in case of absolute necessity; as where there is a total inability to carry the goods to their destination, or otherwise to obtain money indispensable for repairs to complete the voyage. But the purchaser acquires no title, unless such necessity exists.<sup>2</sup>

Factors and  
consignees.

By the Factors' Act (6 Geo. IV. c. 94, s. 2), "persons entrusted with, and in possession of, any bill of lading, Indian warrant, dock warrant, warehouse-keeper's certificate, warrant, or order for the delivery of goods, shall be *deemed and taken to be the true owner of the goods so far as to give validity to sales*" made by them to buyers without notice of the fact that such vendors are not owners. By the fourth section of the same Act, purchasers from "any agent or agents entrusted with any goods, wares, or merchandise, or to whom the same may be consigned," are protected in their purchases, *notwithstanding notice* that the vendors are agents; provided the purchase and payment be made in the usual and ordinary course of business, and the buyer has not notice at the time of purchase and payment, of the absence of authority in the agent to make the sale or receive the payment. And by the Amendment Act, 5 & 6 Vict. c. 39, the possession of the goods themselves is treated as having the same effect as that of bills of lading, or "other documents of title;" and a "document of title" is defined to be "any document used in the ordinary course of business, as

<sup>1</sup> *Lock v. Sellwood*, 1 Q. B. 736.

*Cannan v. Meaburn*, 1 Bing. 243;

<sup>2</sup> *The Gratitude*, 3 Rob. Adm. 259; *Freeman v. East India Company*, 5 B. & A. 621; *Vlierboom v. Chapman*, 13 M. & W. 239; *Underwood v. Robertson*, 4 Camp. 138;

*Tronson v. Dent*, 8 Moore, P. C. 419; *Cammell v. Sewell*, 3 H. & N. 617, and *S. C. in Cam. Scacc.*, 5 H. & N. 728; 29 L. J., Exch. 350; *Maude & P. on Ship*. 446.

proof of the possession or control of goods, or authorising, or purporting to authorise, either by endorsement or delivery, the possessor of such documents to transfer or receive goods thereby represented."

These Acts apply solely to persons entrusted as factors or commission merchants, not to persons to whose employment a power of sale is not ordinarily incident, as a wharfinger who receives goods usually without power to sell.<sup>1</sup> The statute is limited in its scope to mercantile transactions, to dealings in goods and merchandize, and does not embrace sales of furniture or goods in possession of a tenant or bailee for hire. A purchaser in good faith from such vendors would be liable in trover to the true owner.<sup>2</sup> Mr. Chitty, in his "Treatise on Contracts,"<sup>3</sup> has the following passage:—"It is said, however, that if the real owner of goods suffer another to have possession thereof, or of those documents which are the indicia of property therein,—thereby enabling him to hold himself forth to the world as having not the possession only but the property,—a sale by such person to a purchaser without notice will bind the true owner (*per* Abbott, C. J., *Dyer v. Pearson*, 3 B. & C. 38; *per* Bayley, J., *Boyson v. Coles*, 6 M. & S. 14). But probably this proposition ought to be limited to cases where the person who had the possession of the goods was one who from the nature of his employment might be taken *prima facie* to have had the right to sell." This limitation suggested by Mr. Chitty to the rule propounded in the *dicta* of the two learned judges, was approved by the Barons of the Exchequer in *Higgonson v. Burton*,<sup>4</sup> and when thus limited, the principle does not differ substantially from the provisions of the Factors' Act, as amended by the 5 & 6 Vict. c. 39.

Persons entrusted with possession by owners.

But the cases recently decided under the Factors' Act leave this statement open to grave doubt, and show the

Law doubtful under recent decisions.

<sup>1</sup> *Monk v. Wittenbury*, 2 B. & Ad. 672.  
484.

<sup>2</sup> P. 359, 8th Ed.

<sup>3</sup> *Loeschman v. Machin*, 2 S ark.  
311; *Cooper v. Willomat*, 1 C. B.

<sup>4</sup> 26 L. J., Ex. 352. See also *Pickering v. Busk*, 15 East, 38.

extreme difficulty of defining the subject-matter to which it applies.

Hayman v.  
Flewker.

In *Hayman v. Flewker*,<sup>1</sup> a picture-dealer was held to be an "agent" entrusted with the goods under the Act, whose ordinary business was not to sell pictures, but who was authorised to sell the particular pictures in controversy, and instead of so doing, pledged them.

Baines v.  
Swainson.

In *Baines v. Swainson*,<sup>2</sup> the circumstances were that one Emsley, who carried on business at Leeds, as factor and commission merchant, falsely represented to the plaintiffs that he could sell some of their goods to one Sykes. The plaintiffs thereupon sent to the premises of Emsley the goods, to be by him "perched," or stretched on poles, so that the purchaser could examine them, and then to deliver them. The goods were sent in several successive lots. Emsley sold them to the defendant at a less price than he represented he could get from Sykes. The plaintiffs brought trover, and Martin, B., directed the jury to give them a verdict. The Queen's Bench directed a new trial, Wightman and Crompton, JJ., holding Emsley to be an agent within the meaning of the Act, and Blackburn, J., thinking that at all events there was a case for the jury to determine that fact, and also to decide whether the sale had taken place in the ordinary course of business. Crompton and Blackburn, JJ., were of opinion that the agencies referred to by the Act are such as are mercantile only, and of persons who, as mercantile agents, would have to make sales in the ordinary course of business, as had previously been held by Vice-Chancellor Wigram, in *Wood v. Rowcliffe*.<sup>3</sup> Crompton, J., said it was impossible to define what was meant, and "it is one of those loose enactments which conveys much difficulty. When you get to these Acts of Parliament the difficulty is immense."

Fuentes v.  
Montis.

A case is reported of *Fuentes v. Montis*,<sup>4</sup> just as these

<sup>1</sup> 15 C. B. N. S. 519; 32 L. J., C. P. 132.

<sup>2</sup> 4 B. & S. 270; 32 L. J., Q. B. 281.

<sup>3</sup> 6 Hare, 183.

<sup>4</sup> L. R. 3, C. P. 268; 37 L. J., C. P. 137. See, also, *Sheppard v. The Union Bank of London*, 7 H. & N. 661; 31 L. J., Ex. 154.

pages are passing through the press, in which the Court of Common Pleas gave judgment in favour of the plaintiffs, wine merchants, in Spain, for certain casks of sherry, which they had consigned for sale to a London factor, who had pledged them as security for advances made by the defendant after revocation of the factor's authority, although the defendant was in good faith, and ignorant of the revocation, and although the wine remained in the factor's possession; the Court holding that the words "entrusted with and in possession of," must be construed as referring to the time when the factor made the pledge, and that he was no longer "entrusted with" the goods after he had been ordered to deliver them to another factor for account of the consignor, although he had disobeyed the order, and remained "in possession."

Under this decision, which the judges, Willes, Keating, and Smith, expressed regret at being constrained to deliver, the confidence felt by merchants in dealing with factors in relation to goods consigned to them, and in their possession, must be greatly shaken; and there seems certainly to be no mode of *making advances* safely to a factor on the security of goods on consignment, for a merchant or banker in London or Liverpool has no means of finding out whether the foreign consignor has or has not revoked the factor's authority. In this case also Willes, J., expressed his entire concurrence in the following *dictum* of Blackburn, J., reported in *Baines v. Swainson*: "I do not agree with the counsel for the defendant, that the mere fact of an agent being found in possession of goods, although they have been handed to him by the owner knowing that he carries on such a business, amounts to an 'entrusting' him as agent; though I think that under that part of section 4 of Statute 5 & 6 Vict. c. 39, to which I have referred, the fact of a person being put in possession of goods, calls upon the person who gave him possession to explain and show that it was not an entrusting." It would seem to result from this that a *purchaser*, even from a factor, would get no title to goods if the consignor could show that he had sent them to the

factor merely to be kept in storage, or to be forwarded to another place, although the factor was in possession of them with the consent of the consignor, and was a person whose ordinary business consisted in selling goods sent to him on consignment.

No one would venture, in the present state of the authorities, to give a positive opinion as to the true construction of this statute.

#### SECTION II.—WHO MAY BUY.

There are certain classes of persons incompetent to contract in general, but who under special circumstances may make valid purchases. Infants, insane persons, and married women, are usually protected from liability on contracts, as also drunkards when in such a state as to be unable to understand what they are doing; such persons being considered to be devoid of that freedom of will, combined with that degree of reason and judgment that can alone enable them to give the *assent* which is necessary to constitute a valid engagement. The exceptions to this general disability, so far as concerns the competency to purchase, will now be considered.

##### Infants.

*Infants*, that is, persons under the age of twenty-one years, are protected by law from liability on purchases made by them, unless for *necessaries*.

The purchase by an infant, however, is not absolutely void, but only voidable in his favour.<sup>1</sup> He may maintain an action<sup>2</sup> against the vendor during infancy, and he may, on arriving at the age of twenty-one years, confirm his purchase.<sup>3</sup> An action at law will not lie against an infant for fraudulently representing himself of full age and thereby inducing the plaintiff to contract with him:<sup>4</sup> nor would

<sup>1</sup> *Gibbs v. Merrell*, 3. Taunt. 307;      <sup>2</sup> *Warwick v. Bruce*, 2 M. & S. 205.  
*Hunt v. Massey*, 5 B. & Ad. 902;      <sup>3</sup> *Bac. Abr. Infancy* (I) 3; *Holt v.*  
*Holt v. Clarencieux*, 2 Str. 938;      *Ward, Stra.* 939.  
*Zouch v. Parsons*, 3 Burr. 1794; *per*      <sup>4</sup> *Price v. Hewett*, 8 Ex. 146;  
*Abbott, C. J.*, in *The King v. Inhabitants*  
*of Chillesford*, 4 B. & C. at p. 100.      *Johnson v. Pye*, 1 Sid. 258; S. C. 1  
Lev. 169; S. C. 1 Kel. 913.

these facts constitute at law a good replication to a plea of infancy;<sup>1</sup> nor suffice as the basis of a replication on equitable grounds.<sup>2</sup> But they would entitle the plaintiff to relief if made the subject of a bill in equity.<sup>3</sup>

But an infant is competent to purchase for cash or on credit a supply of *necessaries*; and his purchase on credit will be valid even though it be shown that he had an income at the time, sufficient to supply him with ready money to buy necessaries suitable to his condition.<sup>4</sup>

The necessaries for which the infant may make a valid contract of purchase are stated in Co. Litt. 172, to be "his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." But these are not the only articles that are comprehended by the term. It includes also articles purchased for *real use*, although ornamental, as distinguished from such as are *merely* ornamental, for mere ornaments can be necessary to no one:<sup>5</sup> and it was said by Alderson, B., in delivering the judgment of the court in *Chapple v. Cooper*,<sup>6</sup> after advisement, that "articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed. . . . In all cases there must be *personal* advantage from the contract derived to the *infant himself*." The word necessaries must therefore be regarded as a relative term, to be construed with reference to the infant's age, state, and degree.<sup>7</sup>

The cases in which these principles have been applied are quite too numerous to be reviewed in detail, but some examples may be selected, before considering the question whether it is for the court or jury to determine in each case what are or are not necessaries for the infant.

<sup>1</sup> *Johnson v. Pye*, *ut supra*.

<sup>2</sup> *Bartlett v. Wells*, 31 L. J., Q. B. 57.

<sup>3</sup> *Ex parte Unity Joint Stock Banking Association*, 27 L. J., Bank. 33; *Nelson v. Stocker*, 28 L. J., Ch. 760.

<sup>4</sup> *Burghart v. Hall*, 4 M. & W. 727; *Peters v. Fleming*, 6 M. & W. 42.

<sup>5</sup> *Peters v. Fleming*, 6 M. & W. 42.

<sup>6</sup> 13 M. & W. 256. See also *per* Bramwell, B., in *Ryder v. Wombwell*, L. R. 3, Ex. 90; 37 L. J., Ex. 47.

<sup>7</sup> 2 Stephens, Com. 319.



Articles supplied to an undergraduate at Oxford for dinners given to his friends at his rooms, fruit, confectionery, &c., &c., were held not necessities by the Queen's Bench in *Wharton v. McKenzie*,<sup>1</sup> and the Exchequer of Pleas, in a case exactly similar, held that there was no evidence for the jury, and that the plaintiff should be nonsuited.<sup>2</sup>

But where a jury had found that a purchase for the amount of 8*l.* 0*s.* 6*d.* for gold rings, a watch-chain, and a pair of breast-pins, were "necessaries" for an undergraduate at Cambridge, the son of a gentleman of fortune and a member of Parliament, the Exchequer refused to set aside the verdict, holding the question to be one for the jury.<sup>3</sup> Where the defendant, a captain in the army, had ordered livery for his servant and cockades for some of his soldiers, the jury found both to be necessities, but the court, on motion for new trial, required the plaintiff to abandon the charge for the cockades, holding that they were not necessities, Lord Kenyon observing, that as regarded the livery, he could not say that it was not necessary for a gentleman in defendant's position to have a servant, and if so, the livery was necessary.<sup>4</sup> In perilous times, Lord Ellenborough held that regimentals sold to an infant as a member of a volunteer corps enrolled for the national defence, were necessities.<sup>5</sup> But a chronometer, costing 68*l.*, was held, in the absence of proof that it was essential, not to be a necessary for an infant who was a lieutenant in the royal navy.<sup>6</sup> A purchase of a horse by an infant may be valid if it be shown to be suitable to his rank and fortune to keep horses, or if it were rendered necessary by circumstances that he should keep one, as, if he were directed by his physician to ride for exercise:<sup>7</sup> but a purchase of cigars and tobacco by an infant was held not to bind him;<sup>8</sup> nor was the plaintiff allowed to recover the cost

<sup>1</sup> 5 Q. B. 606.

<sup>6</sup> *Berolles v. Ramsay*, Holt, N. P.

<sup>2</sup> *Brooker v. Scott*, 11 M. & W. 67. 77.

*Peters v. Fleming*, 6 M. & W. 42.

<sup>7</sup> *Hart v. Prater*, 1 Jur. 623.

<sup>4</sup> *Hands v. Slaney*, 8 T. R. 578.

<sup>8</sup> *Bryant v. Richardson*, 14 L. T.,

<sup>5</sup> *Coates v. Wilson*, 5 Esp. 152.

N. S. 24; L. R. 3, Ex. 93, in note.

of a silver goblet sold to an infant for 15*l.* 15*s.*, which the plaintiff knew when he supplied it to be intended by the infant for a present to a friend.<sup>7</sup>

Prior to the recent case of *Ryder v. Wombwell*,<sup>1</sup> the law seemed to be settled that on the issue whether goods sold to an infant are necessaries, the court decides, in the first place, whether there is any evidence to show that the articles were necessaries; and if there be such evidence, the question ought to be submitted to the jury.<sup>2</sup> In that case, however, the whole law on this subject was treated by some of the judges as still unsettled, and separate opinions were delivered. The facts were that the defendant, the son of a deceased baronet, was in the enjoyment in his own right of an allowance of 500*l.* a year, during his minority, and entitled to 20,000*l.* on coming of age. He had no fixed residence, but lived, when in London, with his mother, and when in the country, with his elder brother, free of charge. The plaintiff sought to recover from him the following sums:—1st, 25*l.* for a pair of solitaires, or sleeve-buttons, with rubies and diamonds; 2nd, 6*l.* 10*s.* for a smelling-bottle, ornamented with precious stones; 3rd, 15*l.* 15*s.* for an antique silver goblet, with an inscription; 4th, 13*l.* 13*s.* for a pair of coral ear-rings. The goblet was wanted, as the plaintiff was told by the defendant, for a present to a friend, at whose house the defendant had been frequently a guest. Kelly, C. B., rejected evidence offered by the defendant to show that at the time of the purchase of the solitaires, the infant had already purchased articles of a similar description to a large amount, no proof being offered that the plaintiff knew this. The learned Chief Baron refused to nonsuit, but left it to the jury to say whether all or any of the articles were necessaries, suitable to the estate and condition in life of the defendant. The jury found that the solitaires and goblet were necessaries, the other articles not. Leave was

Necessaries—  
question of fact  
or law?

*Ryder v.*  
*Wombwell*

<sup>1</sup> *Ryder v. Wombwell*, L. R. 3, Ex. 33; 37 L. J., Ex. 47. Scott, N. R. 287; *Peters v. Fleming*, 6 M. & W. 42; *Brooker v. Scott*, 11

<sup>2</sup> *Maddox v. Miller*, 1 M. & S. 738; M. & W. 67; *Bryant v. Richardson*, Wharton v. McKenzie, 5 Q. B. 606; L. R. 3, Ex. 93 n.; 14 L. T., *Harrison v. Fane*, 1 M. & G 550, 1 N. S. 24.

reserved to move for a nonsuit, or for reduction of damages, if the court should be of opinion that there was evidence for the jury that one of the two articles was necessary, and not the other. Bramwell, B., was of opinion that the plaintiff ought to have been nonsuited, or a verdict given for the defendant; and that the evidence to show that the defendant was already supplied with similar articles, ought to have been received. Kelly, C. B., delivered the judgment, holding,—first, that the evidence rejected at the trial was properly excluded; secondly, that the verdict for the price of the goblet was against evidence, and should be set aside; and thirdly, that the defendant might have a new trial *on payment of costs* if he desired it, for the price of the solitaires. In the opinion given, the learned Chief Baron, while yielding to the authority of *Brooker v. Scott*<sup>1</sup> and *Bryant v. Richardson*,<sup>2</sup> stated that if he were sitting in a court of error, he would not hesitate to declare his opinion that in no case is a judge entitled to withdraw the question of necessities from the jury. Channell, B., also thought that it was not competent to the Lord Chief Baron to withdraw the case from the jury, but was of opinion there should be a new trial, *on payment of costs*, because the verdict was against the weight of evidence; and Pigott, B., thought the case had been properly left to the jury, but that the verdict was against the evidence. The learned Baron expressed reluctance in condemning the defendant to the costs, but yielded his doubts on that point.

the rejection of evidence in the foregoing case, the learned Chief Baron observed that the decision conflicts with *Brooker v. Scott*,<sup>1</sup> *Bryant v. Richardson*,<sup>2</sup> *Ford v. Fothergill*.<sup>4</sup> It is also the opinion of Lord Tenterden, C. J., in *Story v. Pery*,<sup>5</sup> that “if a tradesman does it at his peril, and he cannot show that the party has been properly

<sup>1</sup> 1 Peake, N. P. 301.

<sup>2</sup> N.

<sup>4</sup> 4 C. & P. 526. See also *Bainbridge v. Pickering*, 2 W. Bl. 1325.

supplied by his friends." Best, C. J., also told the jury, in *Cook v. Denton*,<sup>1</sup> that "the plaintiff *ought to have made inquiries of the father*. . . . As there were proper clothes provided by the father, those furnished by the plaintiff cannot be considered as necessaries." In *Brayshaw v. Eaton*,<sup>2</sup> in the Common Pleas, it was held that such inquiries were not a condition precedent to recovery, but the cases above cited were not questioned so far as they establish the proposition that the vendor furnishes at his peril, and that the goods supplied are not necessaries if the infant is already supplied from another source. *Ryder v. Wombwell*<sup>3</sup> is not reconcileable with the principle of those cases (only one of which, *Burghart v. Angerstein*, was cited), and as it does not profess to overrule them, the effect of the decision is to leave the law on this point in an unsettled and unsatisfactory state.

If an infant be married, his obligations as husband and father in supplying necessaries are the same as if he were of full age, and the things necessary for his wife and children are necessary for himself, and what is supplied to them on his express or implied credit is considered as purchased by him.<sup>4</sup> An illustration of the maxim, "*Persona conjuncta æquiparatur interesse proprio*," is given in Broom's Maxims in these terms:—"So if a man under the age of twenty-one contract for the nursing of his lawful child, this contract is good and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition." Married infant.

An infant being considered in law as devoid of sufficient discretion to carry on a trade, is not liable on a purchase of goods supplied to him for his trade, as being necessaries, whether he be trading alone or in partnership with another.<sup>5</sup> But if he uses goods supplied to him as a tradesman for necessary household purposes, he becomes liable for what is so used.<sup>6</sup> Infant tradesman.

<sup>1</sup> 3 C. & P. 114; and see *Dalton v. Rainsford v. Fenwick*, Carter, 215. *Gibb*, 7 Scott, 117; 5 Bing., N. C. 198.

<sup>2</sup> 5 Bing., N. C. 231.

<sup>3</sup> L. R. 3, Ex. 90.

<sup>4</sup> *Turner v. Frisby*, 1 Str. 168; P. 94.

<sup>5</sup> *Whywall v. Champion*, Str. 1083;

*Dilk v. Keighley*, 2 Esp. 480.

<sup>6</sup> *Tuberville v. Whitehouse*, 1 C. &

Thornton v.  
Illingworth.

In *Thornton v. Illingworth*,<sup>1</sup> a purchase of goods by an infant for the purposes of trade was treated by the Queen's Bench as constituting an exception to the general rule that the contracts of infants are voidable only, not void. Bayley, J., said: "In the case of an infant, a contract made for goods, for the purposes of trade, is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts." Littledale, J., concurred in this view.

Warwick v.  
Bruce.

But in the previous case of *Warwick v. Bruce*<sup>2</sup> (not cited in *Thornton v. Illingworth*), where the infant was plaintiff by his next friend, it appeared that the infant had paid 40*l.*, part of the total price of 87*l.* 10*s.* which he had agreed to give for a quantity of potatoes, and Lord Ellenborough nonsuited the plaintiff on the objection that the contract was a trading contract. A new trial was granted, Lord Ellenborough saying: "It occurred to me at the trial, on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant for he had paid 40*l.*, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment, I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between the case of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would then have been correct; but here the plaintiff is the infant, and sues upon a contract partly executed by him, which it is clear that he may do."

This case is not reconcilable with the *dicta* of the judge in *Thornton v. Illingworth*, for it is plain that if a contract is *absolutely void*, no action can be maintained on it or for the breach of it by anybody. The facts and circumstances of the two cases are widely dissimilar, and the *decision* in the

<sup>1</sup> 2 B. & C. 824. See, also, *Belton v. Hodges*, 9 Bing. 365.      <sup>2</sup> 2 M. & S. 205.

earlier case seems to be more in accordance with general principles than the *reasoning* in the later case. The language of the learned judges in *Thornton v. Illingworth* was wider than was required for the decision of the case before them, and another proposition contained in the same opinion has been overruled, as shown by Lord Denman in *Bateman v. Pinder*,<sup>1</sup> decided in 1842.

As to *lunatics* and persons *non compotes mentis*, the rules of law regulating their capacity to purchase do not differ materially from those which govern such contracts when made by infants. There is no doubt that it is competent for the lunatic or his representatives to show that when he made the purchase, his mind was so deranged that he did not know nor understand what he was doing.<sup>2</sup> Still, if that state of mind, though really existent, be unknown to the other party, and no advantage be taken of the lunatic, the defence cannot prevail; especially where the contract is not merely executory, but executed in the whole or in part, and the parties cannot be restored altogether to their original position. In the case cited in the note, all the authorities will be found quoted and examined.<sup>3</sup> Lunatics.

So far as relates to supplies of necessities to a person of unsound mind, there can be no question that where no advantage is taken of his condition by the vendor, the purchase will be held valid.<sup>4</sup>

A *drunkard*, when in a state of complete intoxication, so as not to know what he is doing, has no capacity to contract in general,<sup>5</sup> but he would be liable for absolute necessities supplied to him while in that condition; and Pollock, C. B., put the ground of the liability as follows: "A contract may be implied by law in many cases, even where the Drunkards.

<sup>1</sup> 3 Q. B. 574.

<sup>2</sup> *Molton v. Camroux*, 2 Ex. 487; and 4 Ex. 17, on error.

<sup>3</sup> S. C., as above. See, also, *Niell v. Morley*, 9 Ves. 478; *Beavan v. M'Donnell*, 9 Exch. 309.

<sup>4</sup> *Marby v. Scott*, 1 Sid. 112; *Lane v. Kirkwall*, 8 C. & P. 679; *Wentworth v. Tubb*, 1 Y. & C., N. C. 171;

*Nelson v. Duncombe*, 9 Beav. 211; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170.

<sup>5</sup> *Molton v. Camroux*, 4 Ex. 17; *Pitt v. Smith*, 8 Camp. 83; *Fenton v. Holloway*, 1 Stark. 126; *Gore v. Gibson*, 13 M. & W. 623; *Cook v. Clayworth*, 18 Ves. Jr. 12.

party protested against any contract. The law says he did contract, because he ought to have done so. On that ground the creditor might recover against him when sober, for necessities supplied to him when drunk."<sup>1</sup>

**Married women.** A *married woman* is absolutely incompetent to enter into contracts during coverture, and has in contemplation of law no separate existence, her husband and herself forming but one person.<sup>2</sup> She cannot even, while living apart from her husband and enjoying a separate maintenance secured by deed, make a valid purchase on her own account, even for necessities, and when credit is given to her there is no remedy but an appeal to her honour.<sup>3</sup> The contract with her is not, as in the case of an infant, voidable only, but it is absolutely void, and therefore incapable of ratification after her coverture has ceased.<sup>4</sup>

**When husband  
is *civiliter*  
*mortuus*.**

The exceptions to the general and very rigid rule as to the incapacity of a married woman to bind herself as purchaser, are well defined. The first is, when the husband is *civiliter mortuus*, dead in law, as when he is under sentence of penal servitude, or transportation, or banishment.<sup>5</sup> The disability of the wife in such cases is said to be suspended, for her own benefit, that she may be able to procure a subsistence. She may therefore bind herself as purchaser when her husband, a convict sentenced to transportation, has not yet been sent away,<sup>6</sup> and also when he remains away after his sentence has expired.<sup>7</sup> But not if he abscond and go abroad in order to avoid a charge of felony.<sup>8</sup>

**Husband, alien,  
resident abroad.**

It was held in some early cases that where a woman's husband was an alien, and resided abroad, and she lived in England, and contracted debts here, she was liable; Lord Kenyon, in one case, putting the decision "on the principle of the old common law, where the husband had abjured

<sup>1</sup> *Gore v. Gibson*, 13 M. & W. 623.

<sup>2</sup> *Co. Littleton*, 112, d.

<sup>3</sup> *Marshall v. Rutton*, 8 T. R. 545.

<sup>4</sup> *Zouch v. Parsons*, 3 Burr. 1794,  
1805; *Com. Dig. Baron & Feme* (W.).

<sup>5</sup> *Ex parte Franks*, 7 Bing. 762;  
*Sparrow v. Caruthers*, cited in n., 1

T. R. p. 6; *De Gaillon v. L'Aigle*, 1  
B. & P. 357.

<sup>6</sup> *Ex parte Franks*, 7 Bing. 762.

<sup>7</sup> *Carroll v. Blencow*, 4 Esp. 27.

<sup>8</sup> *Williamson v. Dawes*, 9 Bing.  
292.

the realm."<sup>1</sup> But this principle was held not to apply to the case of Englishmen who voluntarily abandoned the country.<sup>2</sup> More modern cases seem to throw very strong doubt on the earlier doctrine as regards the capacity of a woman, whose husband is an alien, residing abroad, to contract debts for which she can be sued in England. In *Kay v. Duchesse de Pienne*, where Lord Ellenborough's ruling at Nisi Prius was confirmed by the Court in Banco (8 Camp. 123), his Lordship confined the doctrine of Lord Kenyon to cases where the husband *has never been in the kingdom*, not simply residing abroad, separate from his wife. And in *Boggett v. Frier*, 11 East, 908, the Court observed to counsel, that all these old cases were, so far as opposed to *Marshall v. Rutton*, 8 T. R. 545, overruled by that case. In *Barden v. Keverberg*, where the defendant pleaded coverture, plaintiff replied that defendant's husband was an alien residing abroad, and had never been within the United Kingdom; and that the debt was contracted by the defendant in England, where she was living separate and apart from her husband, as a *feme sole*, and that the plaintiff gave credit to her as a *feme sole*; and that she made the promise in the declaration mentioned as a *feme sole*. There was no demurrer, but the case was tried on the facts alleged by the replication, and denied by rejoinder, and the verdict for plaintiff was set aside by the Court in Banco. Parke, B., said:—"Supposing the replication good, *although I have a strong opinion that it is not* (because the cases in which the wife has been held liable, her husband being abroad, apply only where he is *civiliter mortuus*), you are bound under it, to make out that the husband was an alien, that he was resident abroad, and never in this country, which facts are now admitted—and *also* that the defendant represented herself as a *feme sole*, or that the plaintiff dealt with her believing her to be a *feme sole*;" and the same learned judge threw doubt

<sup>1</sup> *Walford v. Duchess de Pienne*, 2 Esp. 553; *Franks v. De Pienne*, 2 Esp. 587; *Burfield v. De Pienne*, 2 B. & P., N. R. 380; *De Gaillon v. L'Aigle*, 1 B. & P. 357.

<sup>2</sup> *Farrar v. Countess of Granard*, 1 B. & P., N. R. 80; *Marsh v. Hutchinson*, 2 B. & P. 226; *Williamson v. Dawes*, 9 Bing. 292.



upon the report of what Lord Ellenborough said in *Kay v. Duchess de Piennes*.<sup>1</sup>

*De Wahl v. Braune.*

More recently the case of *De Wahl v. Braune*<sup>2</sup> came before the Exchequer. The declaration was on an agreement to purchase the interest of the plaintiff in the benefit of a lease and school for young ladies. Plea in abatement, plaintiff's coverture. Replication, that her husband was an alien, born in Russia, did not reside in this country at the commencement of the action, was never a subject of this country; that the cause of action accrued to plaintiff in England, while she was a subject of our lady the Queen, residing here separate and apart from her husband; that defendant became liable to her as a single woman, and that before and at the time of the commencement of the suit war existed between Russia and this country, and that her husband resided in Russia, and adhered to the said enemies of our lady the Queen. On demurrer, held that the wife could not sue as a *feme sole*; that her husband was not *civiliter mortuus*, and that the contract made during coverture was the husband's. In this case the action was by the wife, but the reasoning of the Court would have been equally applicable if her condition had been reversed, and she had been defendant instead of plaintiff.

Protection  
order for mar-  
ried woman.

A married woman may bind herself as purchaser of goods if she obtain a protection order under the 21st section of the Act, 20 & 21 Vict. c. 85, which provides a remedy for "*a wife deserted by her husband*;" and authorises her to obtain an order to protect her earnings and property, the effect of which is declared to be, during its continuance, that the wife shall be "in the like position, in all respects, with regard to *property* and *contracts*, and *suing*, and *being sued*, as she would be under this Act, if she obtained a decree of judicial separation." And by the 26th section of the same Act, it is provided that "in every case of a judicial separation, the wife shall, while so separated, *be considered as a feme sole for the purposes of contract*, and wrongs and

<sup>1</sup> *Barden v. Keverberg*, 2 M. & W. 61.

<sup>2</sup> 1 H. & N. 178, and 25 L. J., Ex. 343.

injuries, *and suing and being sued* in any civil proceeding." Further provision is made in the Act of 21 & 22 Vict. c. 108, ss. 8, 9, 10, for the protection of persons dealing in good faith with wives who have obtained the orders authorised to be issued under the previous Act of 20 & 21 Vict. c. 85.

The only remaining exception to the absolute incapacity of a married woman to bind herself as purchaser during coverture, is one which arises under the custom of London, and is confined to the City of London. By that custom, a *feme covert* may be a *sole trader*, and when so, she may sue and be sued in the City courts, in all matters arising out of her dealings in her trade in London. In the well-known case of *Beard v. Webb*,<sup>1</sup> where Lord Eldon, C. J., delivered the judgment of Cam. Scacc., reversing that of the King's Bench, this custom is elaborately considered, in connection with the general law on the subject of the wife's capacity to contract as a *feme sole* during marriage; and the custom is described in the pleadings as a custom "that where a *feme covert* of a husband useth any craft in the said city on her sole account, whereof her husband meddleth nothing, such a woman shall be charged as *feme sole* concerning everything that touched her craft."

Married woman  
sole trader in  
city of London.

*Beard v. Webb.*

<sup>1</sup> 2 B. & P. 93.

## CHAPTER III.

### MUTUAL ASSENT.

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#### SECTION I.—OF MUTUAL ASSENT.

Assent, express  
or implied.

THE assent of the parties to a sale need not be express. It may be implied from their language,<sup>1</sup> or from their conduct; may be signified by a nod or a gesture, or may even be inferred from silence in certain cases; as if a customer takes up wares off a tradesman's counter and carries them away, and nothing is said on either side, the law presumes an agreement of sale for the reasonable worth of the goods.<sup>2</sup>

Must be mu-  
tual,

But the assent must, in order to constitute a valid contract, be *mutual, and intended to bind both sides*. It must

<sup>1</sup> See a curious case of what one of the judges termed a "grumbling" assent, in *Joyce v. Swan*, 17 C. B., N. S. 84.

<sup>2</sup> Bl. Com., book ii., ch. 30, p. 443; *Hoadley v. M'Laine*, per Tindal, C. J., 10 Bing. 482.

also *co-exist at the same moment of time*. A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be *unconditional*. If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer, and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer. Thus, if the offer by the intended vendor be answered by a proposal to give a less sum, this amounts to a rejection of the offer, which is at an end, and the party to whom it was made cannot afterwards bind the intended vendor by a simple acceptance of the first offer. The cases are very numerous<sup>1</sup> in support of these principles, which are common to all contracts. A few only of those peculiarly illustrative of the rules as applied to contracts of sale need be specially noticed.

and unconditional.

In *Hutchinson v. Bowker*,<sup>2</sup> the defendant wrote an offer to sell a cargo of *good* barley; the plaintiff replied:—"Such offer we accept, expecting you will give us *fine* barley, and *full weight*." The defendant wrote back: "You say you expect we shall give you 'fine barley.' Upon reference to our offer you will find no such expression. As such, we must decline shipping the same." It was shown on the trial that *good* barley and *fine* barley were terms well known in the trade, and that *fine* barley was the heavier. The jury, although finding that there was a difference in the meaning of the two words, found a verdict for plaintiff. The Court held that it was for the jury to determine the meaning of the words, and for the Court to decide whether there had been mutual assent to the contract; and the plaintiff was nonsuited, on the ground that the defendant's offer had not been accepted by the plaintiff.

*Hutchinson v. Bowker.*

<sup>1</sup> *Champion v. Short*, 1 Camp. 63; *Routledge v. Grant*, 4 Bing. 653; *Hutchinson v. Bowker*, 5 M. & W. 535; *Jordan v. Norton*, 4 M. & W. 155; *Wontner v. Sharp*, 4 C. B. 404; *Duke v. Andrews*, 2 Ex. 290; *Chaplin*

*v. Clarke*, 4 Ex. 403; *Forster v. Rowland*, 7 H. & N. 103, and 30 L. J., Ex. 376; *Honeyman v. Marryat*, 6 H. of L. Ca. 112; *Andrews v. Garrett*, 6 C. B., N. S. 262.

<sup>2</sup> 5 M. & W. 535.

Hyde v.  
Wrench.

In *Hyde v. Wrench*,<sup>1</sup> defendant offered to sell his farm to plaintiff for 1,000*l.* The plaintiff, thereupon, offered him 950*l.*, which defendant refused. Plaintiff then accepted the offer at 1,000*l.*, but defendant declined to complete the bargain. Held, on demurrer, by Lord Langdale, that when plaintiff, instead of accepting the first offer unconditionally answered it by a counter-proposal to purchase at a lower price, "he thereby rejected the offer," and that no contract had ever become complete between the parties.

Governor, &c.,  
of Kingston-  
upon-Hull v.  
Petch.

In *The Governor, Guardians, &c. of the Poor of Kingston-upon-Hull v. Petch*,<sup>2</sup> plaintiffs advertised for tenders to supply meat, stating, "all contractors will have to sign a written contract after acceptance of tender." Defendant tendered, and received notice of the acceptance of his tender, and then wrote that he declined the contract. Held, that by the terms of the proposal, the contract was not complete till the terms were put in writing, and signed by the parties, and that the defendant had the right to retract.

Jordan v.  
Norton.

In *Jordan v. Norton*,<sup>3</sup> defendant offered to buy a mare, if warranted "sound, and quiet in harness." Plaintiff sent the mare, with warranty that she was "sound, and quiet in double harness." Held, no complete contract.

Proposal may  
be retracted  
before accep-  
tance.

It is a plain inference from these cases, that a proposer may withdraw his offer so long as it is not accepted; for if there be no contract till acceptance, there is nothing by which the proposer *can* be bound; and the authorities quite support this inference. Even when on making the offer the proposer expressly promises to allow a certain time to the other party for acceptance, the offer may nevertheless be retracted in the interval, if no consideration has been given for the promise.

Promise to  
leave proposal  
open, not bind-  
ing, if without  
consideration.

Cooke v.  
Oxley.

*Cooke v. Oxley*<sup>4</sup> is the leading case on this point. The declaration was that the defendant had proposed to sell and deliver to the plaintiff 266 hhds. of tobacco on certain terms, if the plaintiff would agree to purchase them on the terms aforesaid, *and would give notice thereof to the defendant*

<sup>1</sup> 3 Beav. 336.

<sup>2</sup> 4 M. & W. 155.

<sup>3</sup> 10 Ex. 610, and 24 L. J., Ex. 23.

<sup>4</sup> 3 T. R. 653.

before the hour of four in the afternoon of that day. Averment, plaintiff did agree, &c., and did give notice, &c., and requested delivery, and offered payment. Judgment arrested after verdict for the plaintiff. Kenyon, C. J., delivering judgment, said: "Nothing can be clearer than that at the time of entering into this contract, the engagement was all on one side. The other party was not bound. It was, therefore, *nudum pactum*." Buller, J., said: "It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract (promise?) was first made. Then as to the subsequent time: the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale, from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time." Grose, J., said: "The agreement was not binding *on the plaintiff* before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is, therefore, no consideration for the promise."

This decision was afterwards affirmed in the Exchequer Chamber, M. 32, Geo. III.<sup>1</sup>

In *Routledge v. Grant*,<sup>2</sup> which was the case of an offer by defendant to purchase a house, and to give plaintiff six weeks for a definitive answer, Best, C. J., nonsuited the plaintiff, on proof that defendant had retracted his offer within the six weeks, and on the rule to set aside the nonsuit, said: "If six weeks are given on one side to accept an offer, the other has six weeks to put an end to it; one party cannot be bound without the other." The Chief Justice in this case cited *Cooke v. Oxley* with marked approval.

*Routledge v.  
Grant.*

<sup>1</sup> So stated in note at the end of the Report, in 3 T. R. 653.

<sup>2</sup> 4 Bing. 653. See also *Humphries v. Carvalho*, 16 East, 45.

**Payne v. Cave.** In *Payne v. Cave*,<sup>1</sup> it was held that a bidder at an auction may retract his bidding any time before the hammer is down; and, *per curiam*, "Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."

**Head v. Diggon.** The latest case on this point is *Head v. Diggon*.<sup>1</sup> The defendant, on Thursday, the 17th of April, gave the plaintiff a written order in these words: "Offered Mr. Head, of Bury, the under wool, &c., &c., *with three days' grace from the above date.*" These words were put in by the defendant expressly as a promise to await three days for the plaintiff's acceptance of the offer. The plaintiff went on Monday to accept, but the defendant refused, saying that the three days were out the day before—Sunday. Holroyd, J., nonsuited the plaintiff, on the authority of *Cooke v. Oxley*. In the course of the argument for new trial, Lord Tenterden said: "Must both parties be bound, or is it sufficient if only one is bound? You contend that the buyer was to be free during three days, and that the seller was to be bound." The new trial was refused, his Lordship saying: "If the contract is to be taken as made only at the time when the plaintiff signified his acceptance of the offer, it is disproved by the circumstance that the defendant did not then agree." And Bayley, J., concurred, on the ground that "unless both parties are bound, neither is."

**Smith v. Hudson.** An illustration of the principle now under discussion is to be found in the recent case of *Smith v. Hudson*.<sup>3</sup> There, a quantity of barley had been verbally sold according to sample, and the goods had been actually delivered to the order of the vendee, at the railway station, so as to put an end to the right of stoppage *in transitu*. But the buyer had not yet accepted so as to make the contract valid under the

<sup>1</sup> 3 T. R. 148.

<sup>2</sup> 3 M. & R. 97.

<sup>3</sup> 6 B. & S. 431; 34 L. J., Q. B.

145. See, also, *Taylor v. Wakefield*, 6 E. & B. 765.

Statute of Frauds, because it was still in his power to exercise the option of accepting or rejecting after examining the quality of the bulk, to see if it corresponded with the sample. The buyer became bankrupt, and the seller at once gave notice to the railway company to hold the barley, subject to his orders; and countermanded the order to convey it to the vendee. The assignees of the buyer insisted on their right to accept the goods in his place, on the ground of the actual delivery to him. But the Court held that the withdrawal of the offer by the countermand of the vendor, before final acceptance, prevented the completion of the contract.

Where parties living at different places are compelled to treat by correspondence through the post, there is a modification of the rule to this extent, that the party making the offer cannot retract after the acceptance by his correspondent has been duly posted, although it may not have reached him;<sup>1</sup> nor can the party accepting retract his acceptance after posting his letter, although prior to his correspondent's receipt of it, nor indeed, if it never be received.<sup>2</sup>

Assent by correspondence.

In *Adams v. Lindsall*,<sup>3</sup> the defendants wrote on the 2nd of September to the plaintiff, offering to sell a quantity of wool on specified terms, "receiving your answer in course of post." The letter was misdirected by the defendants, so that it only reached the plaintiff on the evening of the 7th. An answer was sent on the same evening accepting the offer. This answer was received by defendants on Tuesday, the 9th, in due course. On Monday, the 8th, the defendants not having received the answer, which would have been due on Sunday, the 7th, according to the course of the post, if they had not misdirected their letter making the offer, sold the wool to another person. Action for non-delivery, and verdict for plaintiff. On motion for new trial, it was contended on behalf of the defendants, on the authority of *Payne v. Cave*,<sup>4</sup> and *Cook v. Oxley*,<sup>5</sup> that they had a

*Adams v. Lindsall.*

<sup>1</sup> *Adams v. Lindsall*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. of L. Ca. 381; *Potter v. Saunders*, 6 Hare, 1.

<sup>2</sup> *Duncan v. Topham*, 8 C. B. 225;

*Potter v. Saunders*, 6 Hare, 1.

<sup>3</sup> 1 B. & Al. 681.

<sup>4</sup> 3 T. R. 148.

<sup>5</sup> 3 T. R. 653.



right to retract their offer until notified of its acceptance; that they could not be bound on their side until the plaintiff was bound on his. But the Court said: "If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer, when accepted by the plaintiff, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer, and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter."

Dunlop v.  
Higgins.

This case was cited with approval by Lord Cottenham in *Dunlop v. Higgins*<sup>1</sup> as a leading case, his Lordship remarking that "common sense tells us that transactions cannot go on without such a rule." In *Dunlop v. Higgins*, a proposal sent by mail on the 28th January was received on the 30th, and answered on the same day, but not by the first post of the day, so that it reached the proposer on the 1st of February, instead of the 31st of January. It was held that the answer was posted in time, and that the contract was complete by acceptance when the letter of acceptance was posted; the party accepting not being answerable for casualties at the post-office delaying or preventing the arrival of his letter of acceptance.<sup>2</sup>

Proposal re-  
tracted before  
letter reaches  
destination.

In both the above cases it will be observed that the acceptance of the offer was complete by the posting of the answer *before* the offer was retracted, in accordance with the principle which makes the bargain complete at the moment when *mutual* and *reciprocal* assent has been given. But the language of the Court in *Adams v. Lindsall* is broader than was needed for the decision of that case, for it would extend to an offer sent by mail, and retracted by posting a second letter, *before the first reached its destination*. This point

<sup>1</sup> 1 H. of L. Ca. 381. See, also, *Potter v. Saunders*, 6 Hare, 1. V.-C. Wigram's decision.

<sup>2</sup> On this point, see, also, *Duncan v. Topham*, 8 C. B. 225.

has not yet been presented directly for decision by our courts; and it will be considered in connection with the American cases referred to at the end of the chapter.

Contracts of sale are implied under certain circumstances without any expression of the will or intention of the parties; as where, for example, an express contract has been made, and goods are sent, not in accordance with it, but are nevertheless retained by the purchaser. In such case a new contract is implied that the purchaser will pay for them their value: as where the purchaser retained 130 bushels of wheat furnished on a contract to supply 250 bushels;<sup>1</sup> and where 152 tons of coal were delivered and retained on an order for 200 or 300 tons.<sup>2</sup> The rule was fully recognised by Parke, J., in *Read v. Runn*,<sup>3</sup> and was well exemplified in the case of *Hart v. Mills* in the Exchequer, in 1846.

Implied contracts of sale.

In *Hart v. Mills*,<sup>4</sup> the facts were that the defendant ordered *two* dozen of port and *two* of sherry, to be returned if not approved. Plaintiff delivered next day *four* dozen of each. Defendant not being satisfied with the quality, sent back the whole except one bottle of port and one dozen of sherry, with a note, saying: "I should not have been particular about keeping the four dozen if the quality had suited me. I return the four dozen of port, minus one bottle which I tasted; also three dozen of sherry, as neither suit my palate." The plaintiff contended that the defendant was liable for two dozen of each kind, on the ground that the order was entire, and that he could not keep part and reject the rest. Alderson, B., said: "The defendant orders two dozen and you send four; then he had a right to send back all: he sends back part. What is it but a new contract as to the part he keeps? If you had sent only two dozen of each wine, you would be right; but what right have you to make him select any two dozen from the four?" Held, that the plaintiff could only recover for the thirteen

*Hart v. Mills*

<sup>1</sup> *Oxendale v. Wetherell*, 9 B. & C. 286.

<sup>2</sup> *Richardson v. Dunn*, 2 Q. B. 222.

<sup>3</sup> 10 B. & C. 441; and see *Morgan v. Gath*, 34 L. J., Ex. 165; 3 H. & C. 748.

<sup>4</sup> 15 M. & W. 85.

bottles retained on the new contract resulting from his keeping them.

Implied sale enforced against fraudulent third person.

It has been held that a plaintiff may recover as on an implied contract of sale from a third person, who fraudulently induced him to sell goods to an insolvent purchaser, and then obtained the goods for his own benefit from the purchaser.<sup>1</sup>

Sale implied by recovery in trover.

There is also one special case, in which a sale takes place by the operation of certain principles of law, rather than the mutual assent of the parties, either express or implied. The rule is thus stated in Jenkins, 4th Cent. Ca. 88: "A. in trespass against B. for taking a horse, recovers damages: by this recovery and execution done thereon, the property in the horse is vested in B." *Cooper v. Shepherd*<sup>2</sup> was an action in trover for a bedstead. Plea, a former recovery by plaintiff, in trover, of the same bedstead, in an action against C., and that the conversion by C. was not later than the conversion charged against the defendant, and that C. being possessed of the bedstead, sold it to the defendant, and the taking by the defendant under such sale was the conversion complained of in the declaration. The Court held that this plea averred a *sale* of the bedstead from the plaintiff to C., the vendor of the defendant. On principle, however, it is plain that the recovery in trover would only have this effect in cases where the value of the thing converted is included in the damages recovered.<sup>3</sup>

Assent by mistake.

From the general principle that contracts can only be effected by mutual assent, it follows that where, through some mistake of fact, each was assenting to a different contract, there is no real valid agreement, notwithstanding the apparent mutual assent.

Mistake as to the thing sold. *Thornton v. Kempster*.

Thus, in *Thornton v. Kempster*,<sup>4</sup> the sale was of ten tons of sound merchantable hemp, but it was intended by the

<sup>1</sup> *Hill v. Perrott*, 3 Taunt. 274; *Abbott v. Barry*, 2 B. & B. 369; *Corking v. Jarrard*, 1 Camp. 37; *Clarke v. Shee*, Cowp. 197.

<sup>2</sup> 3 C. B. 266. See, also, *Holmes v. Wilson*, 10 Ad. & E. 503; *Barnett*

*v. Brandon*, 6 M. & G. 640, note.

<sup>3</sup> See reasoning of the Court, in *Chinnery v. Viall*, 5 H. & N. 288, 29 L. J., Ex. 180.

<sup>4</sup> 5 Taunt. 786. See, also, *Keele v. Wheeler*, 7 M. & G. 665.

vendor to sell St. Petersburg hemp, and by the buyer to purchase Riga Rhine hemp, a superior article. The broker had made a mistake in describing the hemp to the buyer, and the Court held that there had been no contract whatever, the assent of the parties not having really existed as to the same subject-matter of sale.

So in *Raffles v. Wichelhaus*,<sup>1</sup> there was a contract for the sale of "125 bales of Surat cotton, guaranteed middling fair merchants' Dhollerah, to arrive ex *Peerless* from Bombay," and the defendant pleaded to an action against him for not accepting the goods on arrival, that the cotton which he intended to buy was cotton on another ship *Peerless*, which sailed from Bombay in October, not that which arrived in a ship *Peerless* that sailed in December, the latter being the cotton that plaintiff had offered to deliver. On demurrer, held that on this state of facts there was no *consensus ad idem*, no contract at all between the parties.

*Raffles v.  
Wichelhaus.*

In *Phillips v. Bistolli*,<sup>2</sup> the defendant, a foreigner, not understanding our language, was sued as purchaser of some ear-rings, at auction, for the price of eighty-eight guineas, and alleged in defence that he thought the bid made by him was forty-eight guineas, and that there was a mistake in knocking down the articles to him at eighty-eight guineas, and Abbott, C. J., left it to the jury to find whether the mistake had actually been made, as a test of the existence of a contract of sale.

Mistake as to  
price.  
*Phillips v.  
Bistolli.*

And so if the parties have expressed themselves in language so vague and unintelligible that the Court find it impossible to affix a definite meaning to their agreement, it cannot take effect. Thus, in *Guthing v. Lynn*,<sup>3</sup> the action was on an alleged warranty on the sale of a horse, and the declaration averred the sale to have been for "a certain price or sum of money, to wit, 68*l*." The proof was of a sale for sixty guineas, and "if the horse was lucky to the plaintiff he was to give 5*l*. more, or the buying of another

Unintelligible  
agreement.

*Guthing v.  
Lynn.*

<sup>1</sup> 2 H. & C. 906; 33 L. J., Ex. 160.

<sup>2</sup> 2 B. & Ad. 232. See, also, *Bourne*

<sup>3</sup> 2 B. & C. 511.

*v. Seymour*, 24 L. J., C. P. 207.

horse." This was insisted on as a variance. On motion for nonsuit according to leave reserved, the Court refused to nonsuit on the ground that the additional clause was unintelligible; that no man could say under what circumstances a horse was to be considered "lucky," nor could any definite meaning be attached to the words "or the buying of another horse," as part of the price of the horse sold. The contract must therefore be considered as proven for the price of 68*l.*, the remainder being looked on as some honorary understanding between the parties.

Mistake or error may be corrected.

But an agreement is not to be deemed unintelligible because of some error, omission, or mistake in drawing it up, if the real nature of the mistake can be shown, so as to make the bargain intelligible. Thus, in *Coles v. Hulme*,<sup>1</sup> a bond to pay 7700 was allowed to be corrected by adding the word "pounds," the recitals in the condition showing that that must have been the meaning of the parties.

So in *Wilson v. Wilson*,<sup>2</sup> Lord St. Leonards said that "both courts of law and courts of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty;"<sup>3</sup> and his Lordship cited a case in *Douglas*<sup>4</sup> where the condition of a bond declared that it was to be void if the obligor did *not* pay what he promised, and the Court struck out the word *not* as a palpable error. And the same principle was established in *Lloyd v. Lord Say and Seale*,<sup>5</sup> in the King's Bench, and affirmed in House of Lords; and in *Langdon v. Goole*<sup>6</sup>: the omitted name of the grantor being supplied by the Court in the first case, and that of the obligee in the second.

Mistake by one party as to collateral fact.

But care must be taken not to confound a mutual mistake as to the subject-matter of the sale, or the price, or the terms, which prevent the sale from ever coming into existence by reason of the absence of a *consensus ad idem*, with a mistake made by one of the parties as to a collateral fact, or

<sup>1</sup> 8 B. & C. 568.

<sup>2</sup> 5 H. of L. Ca. 40.

<sup>3</sup> At p. 66.

<sup>4</sup> Anonymous, *per* Buller, J., in

*Bache v. Proctor*, Doug. 384.

<sup>5</sup> 10 Mod. 46, and 4 Brown's P. C. 73.

<sup>6</sup> 3 Lev. 21.

what may be termed a mistake in motive. If the buyer purchases the very article at the very price and on the very terms intended by him and by the vendor, the sale is complete by mutual assent, even though it may be liable to be avoided for fraud, illegality, or other cause; or even though the buyer or the seller may be totally mistaken in the motive which induced the assent.

And when the mistake is that of one party alone, it must be borne in mind that the general rule of law is, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention as manifested was his real intention.<sup>1</sup>

A party is estopped from denying that an intention manifested by him was his *real* intention.

A mistake by the buyer in supposing that the article bought by him will answer a certain purpose, for which it turns out to be unavailable, is not a mistake as to the subject-matter of the contract, but as to a collateral fact, and affords no ground for pretending that he did not assent to the bargain, whatever may be his right afterwards to rescind it, if the vendor warranted its adaptability to the intended purpose. Thus, in *Chanter v. Hopkins*<sup>2</sup> and *Ollivant v. Bayley*,<sup>3</sup> the purchasers had ordered specific machines from the patentees, and attempted to justify their refusal to pay, on the ground that the machines had totally failed to answer the purpose intended; but in both cases it was held that in the absence of a warranty by the vendors, the contract was binding on the purchasers, notwithstanding their mistaken belief that the machines would answer their purpose.

Mistake by buyer in motive.

In *Scott v. Littledale*,<sup>4</sup> the vendor made a singular mistake. He sold a hundred chests of tea by a wrong sample. A sale by sample imports, as will be seen hereafter, a

Mistake in showing wrong sample.  
*Scott v. Littledale*.

<sup>1</sup> *Per* Lord Wensleydale, in *Freeman v. Cooke*, 2 Ex. 654; *Doe v. Oliver*, and cases in notes, 2 Smith's L. C. 671; *Cornish v. Abington*, 4 H. & N. 549, 28 L. J., Ex. 262; *Alexander v. Worman*, 6 H. & N. 100, 30

L. J., Ex. 198; *Van Toll v. South Eastern Railway Company*, 12 C. B., N. S. 75; 31 L. J., C. P. 241.

<sup>2</sup> 4 M. & W. 399.

<sup>3</sup> 5 Q. B. 288.

<sup>4</sup> 8 E. & B. 815; 27 L. J., Q. B. 201.

warranty by the vendor that the bulk equals the sample. On demurrer to a plea on equitable grounds, setting up this mistake as rendering the contract void for want of mutual assent, the Queen's Bench held that the contract was not void, but was still existing; that if the quality of the bulk was inferior to the sample, the buyer had the right to waive the objection; and the Court said: "Possibly a court of equity might have given the defendant some relief, but it certainly would not have set aside the contract." It is worth observing, that in this case the defendant made no mistake as to the subject-matter of the contract. He sold the very tea, for the very price, and on the very terms which he intended, but he made a mistake in *giving a warranty* that it was of a particular quality. Now a warranty of quality is not an essential element of a sale, but a collateral engagement attached to or omitted from it, at the pleasure of the parties.<sup>1</sup> The assent to the *sale* was complete; the assent to the *warranty* was given by *one* of the parties under a mistake, and this mistake might or might not give ground for other relief, but could not prevent the contract from coming into existence.

Mistake as to  
person con-  
tracted with.

A mistake as to the *person* with whom the contract is made, may or may not avoid the sale, according to circumstances. In the common case of a trader who sells for cash, it can make no possible difference to him whether the buyer be Smith or Jones, and a mistake of identity would not prevent the formation of the contract. But where the identity of the person is an important element in the sale, as if it be on credit, where the solvency of the buyer is the chief motive which influences the assent of the vendor; or when the purchaser buys from one whom he supposes to be his debtor, and against whom he would have the right to set off the price; a mistake as to the person dealt with, prevents the contract from coming into existence for want of assent.

Mitchell v.  
Lepage.

In *Mitchell v. Lepage*,<sup>2</sup> in 1816, the defendant sought to escape liability on a purchase of thirty-eight tons of hemp,

<sup>1</sup> *Chanter v. Hopkins*, 4 M. & W. 858; *Foster v. Smith*, 18 C. B. 156. 899; *Mondell v. Steel*, 8 M. & W. <sup>2</sup> *Holt*, N. P. 253.

on the ground that he had not contracted with the plaintiff, but with other persons. The broker gave defendant a bought note stating the vendors to be Todd, Mitchell, and Co. It turned out that, without the broker's knowledge, that firm had been dissolved some months before by the withdrawal of two of the partners, and succeeded by the plaintiff's firm of Mitchell, Armistead, and Graabner, the last two taking the place of the withdrawn members of the old firm. Gibbs, C. J., told the jury: "I agree with the defendant's counsel that he cannot be prejudiced by the substitution. . . . If by this mistake the defendant was induced to think that he had entered into a contract with one set of men, and not with any other; and if, owing to the broker, he has been *prejudiced or excluded from a set-off*, it would be a good defence." Verdict for plaintiff.

In *Boulton v. Jones*,<sup>1</sup> the plaintiff had bought out the stock-in-trade and business of one Brocklehurst. The defendant, ignorant of the fact, sent to the shop a written order for goods, addressed to Brocklehurst, on the very day of the transfer to the plaintiff, and the latter supplied the goods. The goods were consumed by the defendant, he not knowing that they were supplied by the plaintiff instead of Brocklehurst. When payment of the price was afterwards demanded, the defendant refused, on the ground that he *had a set-off* against Brocklehurst, and had not contracted with the plaintiff. The Barons of the Exchequer were all of opinion that the action was not maintainable. Pollock, C. B., said: "The rule of law is clear, that if you propose to make a contract with A., then B. cannot substitute himself for A. without your consent and *to your disadvantage*, securing to himself all the benefit of the contract."

Martin, B., said: "Where the facts prove that the defendant meant to contract with A. *alone*, B. can never force a contract upon him."

Bramwell, B., said: "It is clear that if the plaintiff were at liberty to sue, it would be *a prejudice to defendant*, be-

<sup>1</sup> 2 H. & N. 564; 27 L. J., Ex. 117.



cause it would deprive him of a set-off, which he would have had if the action had been brought by the party with whom he supposed he was dealing. *And upon that my judgment proceeds.* I do not lay it down, that because a contract was made in one person's name, another person cannot sue upon it, except in cases of agency. But when any one makes a contract in which the personality, so to speak, of the particular party contracted with is important for any reason, whether because it is to write a book, or paint a picture, or do any work of personal skill; or whether because there is a set-off due from that party, no one else is at liberty to step in and maintain that he is the party contracted with; that he has written the book, or painted the picture, or supplied the goods."

Channell, B., said: "The case is not one of principal and agent; it was a contract made with B., who had transactions with the defendant and owed him money, and upon which A. seeks to sue. Without saying that the plaintiff might not have had a *right of action on an implied contract, if the goods had been in existence*, here the defendant had no notice of the plaintiff's claim until the invoice was sent to him, which was not until after he had consumed the goods, and when he could not, of course, have returned them."

Mistake as to  
person, caused  
by fraud.

Where a person passes himself off for another,<sup>1</sup> or falsely represents himself as agent for another, for whom he professes to buy,<sup>2</sup> and thus obtains the vendor's assent to a sale, and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the persons thus deceiving him. The contracts in the cases cited below were held void, on the ground of fraud, but they were equally void for mistake, or the absence of the assent necessary to bring them into existence.

The effect of mistake in preventing the contract from coming into existence, and therefore from being enforced, is the only branch of the subject that appertains to the

<sup>1</sup> *Hardman v. Booth*, 1 H. & C. 803; 32 L. J., Ex. 105.

<sup>2</sup> *Higgon's v. Burton*, 26 L. J., Ex. 342.

Formation of the Contract. The effect of mistake on the rights of the parties after the contract has been performed or executed, will be considered *post*, Book III., Ch. 1, *Of Mistake and Failure of Consideration*.

The assent to a sale may be conditional as well as absolute, and then the formation of the contract is suspended till the condition is accomplished. If A. deliver his horse, on trial, to B., agreeing to take a specified price for him if B. approve him after trial, B. is merely bailee until the condition is accomplished, his assent to become purchaser not having been given when he obtained possession of the horse. Cases of sales "on trial," or of goods "to arrive" by a particular vessel, and the bargains known as "sale or return," are all instances where the assent is conditional. Most of the reported cases, however, have arisen out of disputes as to the *performance* of the conditions, instead of the *formation* of the contract, and the subject can be more intelligibly treated as a whole. The reader is therefore referred to Ch. 1, of Book IV., Part 1, *post*.

Conditional  
assent.

#### CIVIL LAW.

The principles of the common law upon the subject embraced in this chapter do not in general differ from those recognised in America and in countries governed by the civil law.

Civil law.

There is, however, one striking exception. The civil law permits what are termed *quasi-contracts*, and enforces obligations resulting from them. The *negotiorum gestor*, the man who voluntarily assumed to take charge of another's business in his absence, or who, without authority of law, took under his control the person and property of an infant, was held entitled to rights as well as responsible for the obligations resulting from his unauthorised interference. If he spent money usefully in the business thus assumed, he was entitled to recover it back. If he furnished supplies, he was entitled to charge the price as though a contract of sale had intervened. If he paid a debt, he took the credi-

Quasi-contracts.

tor's place. The *quasi-contract*, in a word, produced the effect of creating obligations *ultra citroque*, in the language of the civilians. These principles of the Roman law still prevail unimpaired over continental Europe, and are found expressly sanctioned in the French Civil Code, articles 1570—1575. Pothier says that they are founded on natural equity, and bind even infants and insane persons who are incapable of consent. If, in France, a man should repair his absent neighbour's enclosure,<sup>1</sup> or furnish food to his cattle, without request, he could maintain an action on the *quasi-contract* implied by the law there. At common law, it need hardly be said that no such action would lie. The count for money paid by the plaintiff for the defendant must aver a request by the defendant, and this request, express or implied, must be proven. The principle in our law is invariable that no liability can be established against a man by the mere voluntary payment or expenditure of money in his behalf by a third person; that no man can become the creditor of another without the latter's knowledge or assent.<sup>2</sup>

The text of the Institutes laying down the principles of the Roman law on this point, was not an innovation but a condensation of the numerous texts of the pre-existing law. "Igitur cum quis absentis negotia gesserit, ultra citroque inter eos nascuntur actiones quæ appellantur negotiorum gestorum. Sed domino quidem rei gestæ adversus eum qui gessit, *directa* competit actio, negotiorum autem gestori, *contraria*. Quas ex nullo contractu proprie nasci, manifestum est, quippe ita nascuntur istæ actiones, si *sine mandato* quisque alienis negotiis gerendis se obtulerit; ex qua causâ, ii quorum negotia gesta fuerint, *etiam ignorantes* obligantur." The equity of the law is then stated as follows: "Id que utilitatis causa receptum est, ne absentium qui subita festinatione coacti, nulli demandata negoti-

<sup>1</sup> Pothier, Obl. sec. 114—5.

Durnford v. Messiter, 5 M. & S.

<sup>2</sup> Stokes v. Lewis, 1 T. R. 20; 446; 1 Wms. Saunders, 264, n. 1; Child v. Morley, 8 T. R. 610; Lord England v. Marston, L. R. 1, C. P. Galloway v. Matthew, 10 East, 264; 529; 35 L. J., C. P. 259.

orum suorum administratione, peregre profecti essent, desererentur negotia, quia sane nemo curaturus esset, si de eo quod quis impendisset, nullam habiturus esset actionem."<sup>1</sup> Our action for money had and received, to recover back what has been paid by mistake, is one of those that the Roman lawyers considered as arising *quasi-ex-contractu*. "Item is cui quis per errorem non debitum solvit, quasi ex contractu debere videtur."<sup>2</sup> This action was termed *condictio indebiti*. "Is quoque qui non debitum accepit ab eo qui per errorem solvit, re obligatur; datur que agenti contra eum propter repetitionem, condictitia actio."<sup>3</sup>

## AMERICAN LAW.

In the text-books in America, there has been a singular and almost unanimous attack upon the authority of *Cook v. Oxley*,<sup>4</sup> and Professor Bell, in his "Inquiries into the Contract of Sale," also disapproves it, as contrary to the principles of the civil law and of the law of Scotland. This is the more remarkable, as it is hardly contested that the decisions accord, in the United States at least, with the principles established in the English courts. Professor Bell's remarks on the case are as follows:<sup>5</sup> "It seems inconsistent with the plain principles of equity that a person who has been induced to rely on such an engagement should have no remedy in case of disappointment. If, for example, a merchant propose to sell to another a cargo of sugar or of tobacco, and agree to give him a certain time to determine whether he will buy the goods or not, engaging not to dispose of them till the time has elapsed, and in the meanwhile he dispose of them, and disappoint the person to whom the promise has been made, who may have rejected an advantageous offer from another dealer, it seems unjust that for the disappointment thus occasioned there should be no remedy. The only answer to this in the English law appears to be, that no one is entitled to rely on

American law.  
Criticisms on  
*Cook v. Oxley*.

Professor Bell.

<sup>1</sup> Inst. lib. 3, tit. 27, § 1.

<sup>4</sup> 3 T. R. 653.

<sup>2</sup> Inst. 3. 27. 6.

<sup>5</sup> Bell's Inq. 27

<sup>3</sup> Inst. 3. 14. 1.

a unilateral engagement, gratuitously made and without consideration. But one cannot help feeling that a rule so different from what commonly happens in the intercourse of life, raises that inconsistency between law and justice which is sometimes complained of. The subtleties of lawyers never ought to interfere with the common sense and understanding of mankind; and the law is on a better footing where an engagement seriously made is by the law enforced, without regard to the motive from which it proceeds."

The civil law certainly never went to the length of enforcing an engagement "without regard to the motive from which it proceeds." The distinction between natural obligations—*imperfect obligations* as Pothier terms them,<sup>1</sup> those binding only in honour—and obligations which create legal responsibility, is recognised by the civil quite as explicitly as by the common law. The French Code<sup>2</sup> states the doctrine in a few emphatic words—"L'obligation *sans cause*, ou sur une fausse cause, ou sur une cause illicite, *ne peut avoir aucun effet*." The Pandects are full of texts to a similar effect.<sup>3</sup> Actions might be brought on civil obligations, *civiles obligationes*, and on equitable obligations, *prætorie vel honorariæ obligationes*, as stated in the Institutes;<sup>4</sup> but the natural obligation (the *nuda pactio*) was available only as a defence (*exceptio*). In the language of Ulpian: "*Nuda pactio obligationem non parit, sed parit exceptionem*."<sup>5</sup>

Mr. Story's  
criticism on  
Cook v. Oxley.

Mr. Story, in his Treatise on Sales,<sup>6</sup> while citing the American authorities,<sup>7</sup> which are perfectly in accord with the English law on this point, concurs with Professor Bell in the opinion that the rule in Cook v. Oxley<sup>8</sup> is unjust and inequitable. In his strictures on the decision, he denies that the grant of time to accept the offer is made without

<sup>1</sup> Traité d'Obl. Art. prélim.

<sup>2</sup> Art. 1131.

<sup>3</sup> Tot. tit. De Condit. Sine Causâ;  
L. 7, § 7, De Pactis.

<sup>4</sup> Inst. 3. 13. 1.

Dig. 2. 14. 7. § 4, f. Ulp. There  
is a special treatise on natural obligations under the Roman law, by

Machelard. Paris, 1861.

<sup>6</sup> Story on Sales, § 127.

<sup>7</sup> Eakridge v. Glover, 5 Stew. &  
Port. 264; Faulkner v. Heberd, 26  
Vermont, 452; Beckwith v. Cheever,  
1 Foster (N. H.), 41.

<sup>8</sup> 3 T. R. 653.

consideration. He suggests, as one sufficient legal consideration, the expectation or hope that the offer will be accepted. This appears to be more fanciful than serious. The hope of A. that his offer will be accepted if he gives B. time to consider it, is not a consideration moving from B. to A., but is the spontaneous emotion of A. arising out of his own act; for in the case supposed, B. is bound to nothing, does nothing, gives nothing, promises nothing to raise this hope. The second consideration suggested by Mr. Story is, that "the making of such an offer might betray the other party into a loss of time and money by inducing him to make examination, and to inquire into the value of the goods offered; and this inconvenience assumed by him is a sufficient consideration for the offer." This argument assumes as a fact the exact reverse of the facts alleged in the declaration. It takes for granted that "an inconvenience is assumed" by the party to whom the offer is made; and it is precisely on the absence of this consideration that the decision was put, Buller, J., saying: "In order to sustain a promise, there must be *either a damage to the plaintiff, or an advantage to the defendant, but here was neither.*"

In Kent's Commentaries it is said in the note to p. 631 (11th edition), that the "criticisms which have been made upon the case of *Cook v. Oxley* are sufficient to destroy its authority." Mr. Duer, in his *Treatise on Insurance*,<sup>1</sup> goes still further, and says that *Cook v. Oxley* decides "that when a bargain has been proposed, and a certain time for closing it has been allowed, there is no contract even when the offer has not been withdrawn, and has been accepted within the limited period; to constitute a valid agreement, there must be proof that the party making the offer assented to its terms after it was accepted." If this were indeed the decision, nothing could be more surprising than to find it upheld as sound law by a series of eminent English judges. But *Cook v. Oxley* has been totally misapprehended by those who have thus criticised it, and there

Editor of Kent's  
Commentaries.

Mr. Duer.

Review of the  
criticisms.

<sup>1</sup> Vol. i. p. 118.

is nothing to warrant the suggestion that it is misreported, or that Bayley, J., stated it to be misreported in the observations made by him in *Humphries v. Carvalho*.<sup>1</sup> It is difficult to see how the case *could* be misreported, for it was a motion in arrest of judgment, which presents the question exactly as on a general demurrer,<sup>2</sup> and was decided on the ground that the declaration, which is copied in the report, showed no cause of action. An examination of it shows that the plaintiff alleged—First, an offer by the defendant to sell at a certain price; Second, a promise to leave the offer open till four o'clock, *if plaintiff would agree to purchase, and would give notice to the defendant before the hour of four o'clock*; Third, that the plaintiff did agree, and did give notice *before four o'clock*. There was *no allegation that the defendant actually left the offer open till four o'clock, but only that he promised to do so*. The plaintiff's action was tested by the Court on two theories—First, that it was for a breach of promise to leave the offer open; or secondly, that it was for a breach of a contract, that became complete by the plaintiff's acceptance of an offer that had actually remained open. On the first theory it was held that the declaration was insufficient, because it alleged no consideration for the *promise*. On the second theory it was held that the declaration was insufficient, because it did not *allege* that the defendant had actually left the offer open for acceptance as he had promised. The Court did not decide that the contract would not have been completed if the offer, *remaining open*, had been accepted; but that nothing showed that the offer was open when accepted. Lord Kenyon, C. J., construed the declaration as proceeding on the first theory, that is, breach of promise to keep the offer open, and he said that this promise was *nudum pactum*. Buller, J., took both grounds, saying that the promise in the morning was without consideration; and that it was *not stated* that the defendant agreed afterwards, or even that the goods were kept; in other words that the plaintiff had not *alleged* a binding

<sup>1</sup> 16 Ea. t. 45.

<sup>2</sup> *Collins v. Gibbs*, 2 Burr. 899; *Bowdell v. Parsons*, 10 East, 359.

legal promise in the morning, nor a complete contract in the afternoon; and Grose, J., also said that the defendant was not bound before four o'clock, and *it is not stated* that they came to a subsequent agreement.

That this was really the decision is shown by what was said by Mr. Justice Bayley in *Humphries v. Carvalho*,<sup>1</sup> which is strangely construed by Mr. Duer into an assertion that *Cook v. Oxley* was misreported. This is the language:—"The question in *Cook v. Oxley* arose upon the record, and a writ of error was afterwards brought upon the judgment of this Court, by which it appears that the objection made was, that there was only a proposal of sale by the one party, and *no allegation* that the other party had acceded to the contract of sale."

Both the learned American authors, Mr. Story and Mr. Duer, refer to *Adams v. Lindsall*,<sup>2</sup> as overruling *Cook v. Oxley*, the latter writer saying that "its authority is directly overthrown" by *Adams v. Lindsall*. Certainly the King's Bench did not in this last case say a word in disparagement of *Cook v. Oxley*; and when this very point was urged by counsel in *Routledge v. Grant*,<sup>3</sup> Best, C. J., pointed out that there was no conflict between the cases, for *Adams v. Lindsall* proceeded expressly on the ground that a treaty by correspondence through the post rested on exceptional principles, because the separation of the parties prevented assent at the same instant, and *ex necessitate rei*, some point of time must be fixed when the contract should be considered complete; for otherwise, the interchange of letters would go on *ad infinitum*. The Court was therefore driven to determine either that no contract was possible by correspondence between distant parties, or to fix some point at which the contract became perfect. The rule adopted was in entire accordance with sound principle, and declared that the offer by letter was a continuing offer in contemplation of law until it reached the other party, so that when an answer of acceptance was placed in the post, addressed to the party making

<sup>1</sup> 16 East, 45.

<sup>2</sup> 1 B. & Ald. 681.

<sup>3</sup> 4 Bing. 658.



the offer, the *aggregatio mentium*, the mutual assent was complete. But in *Cook v. Oxley* it did not appear that this mutual assent ever took place. There was no *continuing offer* till four o'clock, but only a *promise* to continue it, not binding for want of consideration. The Court held that Oxley had a right to retract, up to the moment when Cook announced his assent to the offer. So the Court would no doubt have held in *Adams v. Lindsall*, that the latter had a right to retract up to the moment when Adams accepted; but Lindsall's withdrawal of his offer, and resale of the wool, occurred *after acceptance*, though he was ignorant of the fact of acceptance. In a word, Oxley withdrew his offer *before acceptance*, Lindsall *after acceptance*, and the contract was held incomplete in the former case and complete in the latter, both decisions being consistent applications of one and the same principle, namely, that a contract becomes complete only when the mutual assent of the parties concurs at the *same moment of time*; and that no number of *alternate offers* and withdrawals, refusals and acceptances, can ever suffice to conclude a bargain.

To these remarks may be added the fact that in 1829 the King's Bench decided *Head v. Diggon*<sup>1</sup> on the authority of *Cook v. Oxley*, without any intimation that it had been overruled, and in accordance with the point really decided in that case.

American decisions.  
Mode of completing a bargain by correspondence.

On the question of the mode of completing a bargain by correspondence, the American authorities are not only in accordance with the decisions of our own courts, but they have gone further, and covered the point left undecided in *Adams v. Lindsall*, though included in the *dicta*.

Mactier v. Frith.

In *Mactier's Adm's v. Frith*,<sup>2</sup> the Court of Errors of New York decided, after a full review of the authorities, that where the dealing is by correspondence, "the acceptance of a written offer of a contract of sale consummates the bargain, *provided the offer is standing at the time of the acceptance.*"

<sup>1</sup> 3 M. & B. 97.

<sup>2</sup> 6 Wendell (N. York), 104.

The point was still left open as to the effect of a revocation of the offer not communicated to the party accepting at the time of acceptance.

In the more recent case of *Tayloe v. Merchants' Fire Insurance Company*,<sup>1</sup> the Supreme Court of the United States has closed this last point in America, by holding that under such circumstances, "an offer prescribing the terms of insurance is intended and is to be deemed a valid undertaking by the Company that they will be bound according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and *that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.*" Although this decision was given on an insurance contract, the reasoning of the Court was quite applicable to all other bargains between parties. Nelson, J., who delivered the opinion, said: "On the acceptance of the terms proposed, transmitted in due course of mail to the company, the minds of both parties have met on the subject, *in the mode contemplated at the time of entering upon the negotiation*, and the contract becomes complete. The party to whom the proposal is addressed, has a right to regard it as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected. Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be in turn proposed by the applicant to the company for *their* approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows of course that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance. It is apparent, therefore, that such an interpretation of the acts of the parties would *defeat the object which both had in view in entering upon the correspondence.* \* \* \*

*Tayloe v. Merchants' Fire Insurance Company.*

<sup>1</sup> 9 How. Sup. Ct. Rep. 390.

“The fallacy of the opposite argument, in our judgment, consists in the assumption that the contract cannot be consummated without a *knowledge* on the part of the company that the offer has been accepted. \* \* But a little reflection will show that in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. \* \* The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor for the same reason can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence. The acceptance must succeed the offer after the lapse of *some* interval of time, and if the process is to be carried further, in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from one party to the other.”

Civilians, on  
contracts by  
correspondence.  
Pothier.

The civilians do not accord with these views. Pothier says: “If I write to a merchant of Leghorn a letter, in which I propose to purchase of him a certain quantity of merchandise at a certain price, and before my letter can have reached him I write a second letter withdrawing my proposal, although the merchant of Leghorn, in ignorance of the change of my intentions, answers that he accepts the proposed bargain, yet there is no contract of sale between us; for my intention not having continued until the time at which my letter was received, and my proposal accepted, the assent or concurrence of our wills necessary to form a contract of sale has not occurred. It must be observed, however, that if my letter causes the merchant to be at any expense in proceeding to execute the contract proposed, or if it occasion him any loss, as, for example, if in the intermediate time between the receipt of my first and that of my second letter, the price of the merchandise falls, and my first letter has made him miss the opportunity to sell it before the fall of the price; in all these cases I am bound to indemnify him, unless I prefer to agree to the bargain as proposed by my

first letter. This obligation results from that rule of equity that no person shall suffer for the act of another: *nemo ex alterius facto prægravari debet*. I ought, therefore, to indemnify him for the expense and loss which I occasion by making him a proposition which I afterwards refused to execute. For the same reason, if the merchant, on the receipt of my first letter, and before receiving the second, which contains a revocation of it, ships for my account and forwards the merchandise, though in that case there has not properly been a contract of sale between us, yet he will have a right to compel me to execute the proposed contract, not in virtue of any contract of sale, but of my obligation to indemnify him, which results from the rule of equity above mentioned.”<sup>1</sup>

It is impossible to read the reasoning of this eminent jurist in the passages just cited, without feeling that it fails to meet the difficulties of the case. He places the proposer in the instances suggested under all, and more than all, the obligations of a purchaser, while insisting that he has made no purchase. The ground suggested, that it is the act of the proposer which causes damage to the other, and thus imposes an equitable obligation to repair that damage, is a *petitio principii*. *Ex hypothesi*, the party receiving the offer, knows that it may legally be retracted by a second letter despatched to him before his acceptance, and he accepts subject to this risk. If, therefore, before waiting the time necessary to learn whether the offer had been actually retracted at the date of his acceptance, he incurs expense or loss in a premature attempt to execute a non-existent contract, surely it is his own precipitancy, and not his correspondent's conduct which is the real cause of the damage. So, too, if there be a fall in the market, on what ground is he entitled to make his correspondent suffer the loss, when plainly in the contrary event the profit would accrue to himself? To make a mere negotiation not resulting in a bargain operate so as to place the proposer in *duriori casu*

Not satisfactory.

<sup>1</sup> Pothier. Contrat de Vente, No. 32.

than he would be if bound by a perfect contract; to render him liable for a fall in the market without the correlative chance of profit from a rise, is a proceeding which fails to awaken a response from that sense of equity to which Pothier appeals; and notwithstanding the imposing authority of his name, it may be doubted whether the doctrine thus propounded would stand the test of discussion at the bar of a tribunal governed even by the civil law.<sup>1</sup>

Common and civil law as to order for purchase by correspondence.

Both the common and the civil law, however, concur in relation to the case where an order for purchase or sale is transmitted by correspondence to an *agent* of the writer. If A., in Liverpool, order his correspondent, B., in New York, to purchase a cargo of flour for account of A., and B. execute the order before receiving a countermand, A. remains bound, even though he may have posted the countermand before the execution of the order. The civil law is express on this point:—"Si mandassem tibi ut fundum emereres, postea scripsissem ne emereres, tu antequam scias me vetuisse, emissis, mandati tibi obligatus ero, ne damno afficiatur is qui mandatum suscepit." Dig. L. 17, tit. 1, sec. 15. The contract here is one of agency, not of sale, and is governed by totally different principles; for in agencies, a revocation of authority by the principal cannot take effect till it reaches the agent.<sup>2</sup>

But although this is a different contract, the analogy is very strong between it and a bargain and sale by correspondence. If A. send an agent to B. with a proposal for sale, even the civilians admit that A. cannot revoke the authority of the agent to make the offer until the revocation reaches him. So that if A. despatched C. with an order recalling the authority, even before the agent had made the offer, A. would still remain bound by a bargain made before C.'s arrival with the countermand. Why should there be any

<sup>1</sup> Mr. Story is of a contrary opinion, and lauds this doctrine as "by far the fairest and most intelligible rule that can be found." § 130, note.

<sup>2</sup> Story on Agency, § 470, 6th edit. *Per* Bayley, J., in *Salte v. Field*, 5 T. R. 215.

difference when the proposer sends his proposal by the public post, which he authorises to deliver it? A., by sending a letter from London, addressed to B. in Manchester, really gives to the public post authority to hand to B. a written offer, and to receive an answer in behalf of A. Even on the doctrines of the civil law, it would seem to be permissible under such circumstances to hold that A.'s revocation comes too late, if it only arrives after the completion of the bargain thus authorised to be made in his behalf. In reality, the true theory of the case seems to be that an offer sent by mail is an authority to the party to whom it is sent, to bind the sender by acceptance, and includes an implied promise that no revocation is to take effect till received by the agent.

The cases that arise in attempts to contract by correspondence present at times very singular complexity. In *Dunmore v. Alexander*,<sup>1</sup> the party to whom the proposal was made wrote and posted a letter of acceptance; and then wrote and posted a letter recalling the acceptance, and *both letters reached the proposer at the same time*. The majority of the Court of Sessions in Scotland held that there was no contract, reversing the judgment of the lower court; and a very similar case is cited by Merlin, Repert. tit. Vente, sec. 1, art. 3, no. 11, where an offer was sent by letter to buy goods on certain conditions. The offer was accepted by letter, but by a subsequent letter the unconditional acceptance was recalled, the writer proposing some modification in the conditions. Both letters reached the original proposer together, and he declined to execute the contract. It was held that the proposer could not be forced to perform the bargain, the second answer to his proposal authorising him to consider the acceptance as withdrawn.

*Dunmore v.  
Alexander.*

In the case of *M'Culloch v. The Eagle Insurance Company*,<sup>2</sup> A. wrote to ask B. on what terms he would insure a vessel. B. wrote on the 1st January that he would insure at a specified rate, and on the 2nd January wrote a letter retracting his offer. A. had written an acceptance of the

*M'Culloch v.  
Eagle Insurance  
Company.*

<sup>1</sup> 9 Shaw & Dunlop, 190.

<sup>2</sup> 1 Pick. (Connect. R.) 283.

offer before receiving the second letter, *but after B. had posted the second letter*, and it was held that there was no contract; but this case is disapproved by the American text-writers, and is in conflict with the decision of the Supreme Court of the United States in *Tayloe v. Merchants' Fire Insurance Company*, cited *ante*, p. 51.

## CHAPTER IV.

### OF THE THING SOLD.

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As there can be no sale without a thing transferred to the purchaser in consideration of the price received, it follows, that if at the time of the contract the thing *has ceased to exist*, the sale is void. A thing which has ceased to exist.

In *Strickland v. Turner*<sup>1</sup> a sale was made of an annuity dependent upon a life. It was afterwards ascertained that the life had already expired at the date of the contract, and not only was the sale held void, but *assumpsit* by the purchaser to recover back the price paid as money had and received was maintained. *Strickland v. Turner.*

In *Hastie v. Couturier*<sup>2</sup> a cargo of corn, loaded on a vessel not yet arrived, was sold on the 15th of May. It was afterwards discovered that the corn having become heated had been discharged by the master at an intermediate port, and sold on the 21st of the preceding month of April. Held, that the sale of the 15th of May was properly repudiated by the purchaser. *Hastie v. Couturier.*

These cases are sometimes treated in the decisions as dependent on an implied warranty by the vendor of the existence of the thing sold: sometimes on the want of consideration for the purchaser's agreement to pay the

<sup>1</sup> 7 Exch. 208. Exch. 40. See also *Barr v. Gibson*,  
<sup>2</sup> 9 Exch. 102, and 5 H. of L. Ca. 8 M. & W. 390.  
 673, reversing the judgment in 8



price. Another, and perhaps the true ground, is rather, that there has been no contract at all, for the assent of the parties being founded on a mutual mistake of fact, was really no assent, there was no subject matter for a contract, and the contract was therefore never completed. This was the principle applied by Lord Kenyon in a case where the leasehold interest which the buyer agreed to purchase, turned out to be for six years instead of eight and a half, and where he held the contract void, as founded on a mistake in the thing sold, the buyer never having agreed to purchase a less term than that offered by the vendor.<sup>1</sup> This is also the opinion of the civilians. Pothier<sup>2</sup> says, "There must be a thing sold, which forms the subject of the contract. If then, ignorant of the death of my horse, I sell it, there is no sale, for want of a thing sold. For the same reason, if when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null because the house, which was the subject of it, did not exist: the site and what is left of the house are not the subject of our bargain, but only the remainder of it." And the French Civil Code, art. 1109, is in these words, "There is no valid assent, where assent has been *given by mistake*, extorted by violence, or surprised by fraud."

Things not yet  
in existence,  
or not yet  
acquired by  
vendor.

In relation to things *not yet in existence*, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be *sold*, while the other can only be the subject of an *agreement to sell*, of an executory contract. Things not yet existing which may be sold, are those which are said to have a *potential existence*, that is, things which are the natural product or expected increase of something already belonging to the vendor. A man may sell the crop of hay to be grown on his field, the wool to be clipped from his sheep at a future time, the milk that his cows will yield in the coming

<sup>1</sup> Farrar v. Nightingale, 2 Esp. 139.      <sup>2</sup> Contrat de Vente, No. 4.

month,<sup>1</sup> and the sale is valid. But he can only make a *valid agreement to sell, not an actual sale*, where the subject of the contract is something to be afterwards acquired,<sup>2</sup> as the wool of any sheep, or the milk of any cows, that he may buy within the year, or any goods to which he may obtain title within the next six months. This distinction involves very important consequences, as will be pointed out hereafter. (Book II.) For the present it suffices to say, that in an actual sale, the property passes, and the risk of loss is in the purchaser, while in the agreement to sell, or executory contract, the risk remains in the vendor.

The leading modern case on the subject is *Lunn v. Thornton*,<sup>3</sup> decided in 1845. The action was *trover* for bread, flour, &c. The plaintiff, in consideration of a sum loaned to him, had by deed-poll covenanted that he "sold and delivered unto the defendant all and singular his goods, household furniture, &c., then remaining and being, or which should at any time thereafter remain and be in his dwelling house, &c." Tindal, C. J., in delivering the opinion of the Court, said, "It is not a question whether a deed might not have been so framed as to have given the defendant a *power of seizing* the future personal goods of the plaintiff, as they should be acquired by him, and brought on the premises, in satisfaction of the debt, but the question arises before us on a plea which puts in issue the *property* in the goods, and nothing else: and it amounts to this, whether by law a deed of bargain and sale of goods can *pass the property* in goods which are not in existence, or at all events, which are not belonging to the grantor at the time of executing the deed." *Held* in the negative. Subsequent cases are to the same effect.<sup>4</sup>

<sup>1</sup> 14 Viner's Ab. tit. Grant, p. 50; Shep. Touch. Grant, 241; Perk. § 65, 90; Grantham v. Hawley, Hob. 132; Wood and Foster's case, 1 Leon, 42; Robinson v. Macdonnell, 5 M. & S. 228.

<sup>2</sup> *Per* Mansfield, C. J., in Reed v. Blades, 5 Taunt. 212, 222.

<sup>3</sup> 1 C. B. 379.

<sup>4</sup> Gale v. Burnell, 7 Q. B. 850; Congreve v. Evetts, 10 Exch. 298, and 23 L. J., Exch. 273; Hope v. Hayley, 5 E. & B. 830, and 25 L. J., Q. B. 155; Chidell v. Galloworthy, 6 Com. B., N. S. 471; Allatt v. Carr, 27 L. J., Ex. 385. See also Moakes v. Nicholson, 34 L. J., C. P. 273; 19 C. B., N. S. 290.

But though the actual *sale* is void, the agreement will take effect if the vendor, by some act done after his acquisition of the goods, clearly shows his intention of giving effect to the original agreement, or if the vendee obtains possession under authority to seize them. This modification of the rule is recognised in the cases just cited, and rests originally on the authority of the fourteenth rule in Bacon's Maxims: "*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu.*"

Rule different  
in equity.

It is well to observe that in equity a different rule prevails on this subject; and that a contract for the sale of chattels to be afterwards acquired, transfers the beneficial interest in the chattels, as soon as they are acquired, to the vendee. The whole doctrine with its incidents, both at common law and in equity, was twice argued, and thoroughly discussed and settled, in the case of *Holroyd v. Marshall*,<sup>1</sup> where Lord Westbury and Lord Chelmsford gave elaborate opinions, concurred in by Lord Wensleydale, although his Lordship's first impressions had been adverse to their conclusions.

*Holroyd v.*  
*Marshall.*

In relation to executory contracts for the sale of goods not yet belonging to the vendor, Lord Tenterden held, in an early case<sup>2</sup> at Nisi Prius, that if goods be sold, to be delivered at a future day, and the seller has not the goods, nor any contract for them, nor any reasonable expectation of receiving them on consignment, but intends to go into the market and buy them, it is not a valid contract but a mere wager on the price of the commodity. But this doctrine is quite exploded, and *Bryan v. Lewis* was expressly over-ruled by the Exchequer of Pleas in *Hibblewhite v. McMorris*,<sup>3</sup> and *Mortimer v. McCallan*,<sup>4</sup> after being questioned in the Common Pleas in *Wells v. Porter*.<sup>5</sup>

In America,  
executory

In America it has been decided, that if a vendor sell a

<sup>1</sup> 10 H. of L. Ca. 191.

<sup>4</sup> 6 M. & W. 58.

<sup>2</sup> *Bryan v. Lewis*, Ry. & Mo. 386,  
in 1826.

<sup>5</sup> 2 Bing. N. C. 722, and 3 Scott,  
141.

<sup>3</sup> 5 M. & W. 462.

thing not belonging to him, and subsequently acquires a title to it before the repudiation of the contract by the purchaser, the property in the thing sold vests immediately in the purchaser.<sup>1</sup> So in a contract of "sale or return," where the vendor had no title at the time of sale, but acquired one afterwards, before the time limited for the return; held, that the buyer who had allowed the time to elapse without returning the thing sold, could not set up the failure of consideration in the original contract, as a defence in an action for the price.<sup>2</sup>

agreement becomes executed, as soon as vendor acquires title.

The civilians held that an expectation dependent on a chance may be sold, and the illustration usually given, is that of the fisherman who agrees to sell a cast of his net for a given price;<sup>3</sup> and this is adopted by Mr. Story.<sup>4</sup> The illustration is perhaps not very well chosen. The case supposed is rather one of work and labour done, than of sale. The fisherman owns nothing but the tools of his trade, *i.e.*, his net. What is in the sea is as much the property of any body else as of himself. If a third person gives him money to throw a cast of his net for the benefit of that person, the contract is in its nature an employment of the fisherman for hire. If the contract were, that the fisherman should throw his net for a week or a month, at a certain sum per week or month, and that the catch should belong to him who paid the money, no one would call this a contract by the fisherman for the sale of his catch, but a contract of hire of his labour in fishing for an employer. It is no more a contract of sale when he is paid by the job or piece, for a single cast, than when he is paid by the month for all his casts.<sup>5</sup> But though the illustration may be questioned, the rule itself is correct in principle, and might

Sale of a hope dependent on a chance.

*Venditio spei.*

<sup>1</sup> *Frazier v. Hilliard*, 2 Strobb. 309; *Blackmore v. Shelby*, 8 Humph. (Tenness.), 439.

<sup>2</sup> *Hotchkiss v. Oliver*, 5 Denio (N. Y.), 314.

<sup>3</sup> Dig. L. 8, § 1, de Contr. empt. Pothier, *Vente* No. 6.

<sup>4</sup> *Story on Sales*, 191.

<sup>5</sup> The vexed subject of the true test by which to determine whether certain contracts are in their nature contracts of sale, or contracts for work and labour, and materials furnished, is discussed *post*, Part 2, Ch. 1.

be exemplified by supposing a sale by a pearl fisherman of any pearls that might be found in oysters already taken by him, and which had thus become his property. Such a contract would not be a bargain and sale at common law, but would be a valid executory contract, binding the purchaser to pay the price, even if no pearls were found; for as was said by Lord Chief Baron Richards, in *Hitchcock v. Giddings*,<sup>1</sup> "if a man will make a purchase of a chance, he must abide by the consequences."<sup>2</sup>

The rules of law applicable to the sale of things immoral, noxious, or illegal, are discussed *post*, Book III., Chapter 3, on Illegality.

<sup>1</sup> 4 Price, 135.

ling, 6 E. & B. 659; 25 L. J., Q. B.

<sup>2</sup> See also observations of Lord Campbell, C. J., in *Hanks v. Pul-*

375.

## CHAPTER V.

### OF THE PRICE.

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It has already been stated that the price must consist of *money*, paid or promised. The payment of the price in sales for cash or on credit will be the subject of future consideration, when the Performance of the Contract is discussed. We are now concerned solely with the agreement to make a contract of sale.

Where the price has been expressly agreed on, there can arise no question; but the price of goods sold may be determined by other means. If nothing has been said as to price when a commodity is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth. In *Acebal v. Levy*,<sup>1</sup> the Court of Common Pleas, while deciding this to be the rule of law in cases of *executed* contracts, expressly declined to determine whether it was also applicable to *executory* agreements. But in the subsequent case of *Hoadly v. McLaine*,<sup>2</sup> the same Court decided that in an executory contract, where no price had been fixed, the vendor could recover in an action against the buyer, for not accepting the goods, the reasonable value of them; and this is the unquestionable rule of law.<sup>3</sup>

When no price has been fixed, reasonable price implied.

<sup>1</sup> 10 Bing. 376.

<sup>2</sup> 10 Bing. 482.

<sup>3</sup> *Valpy v. Gibson*, 4 C. B. 837; 2

*Saund.* 121e, n. 2, by Williams, Serj.,  
to *Webber v. Tivill*.

What is meant  
by a reasonable  
price.

*Acebal v. Levy.*

In *Acebal v. Levy*, the Court further declared that where the contract is implied to be at a reasonable price, this means, "Such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. This price may or may not agree with the *current price* of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes."

Price to be fixed  
by valuers.

It is not uncommon for the parties to agree that the price of the goods sold shall be fixed by valuers appointed by them. In such cases they are of course bound by their bargain, and the price when so fixed is as much part of the contract as if fixed by themselves. But it is essential to the formation of the contract that the price should be fixed in accordance with this agreement, and if the persons appointed as valuers fail, or refuse to act, there is no contract in the case of an *executory* agreement, even though one of the parties should himself be the cause of preventing the valuation.<sup>1</sup> But if the agreement has been executed by the delivery of the goods, the vendor would be entitled to recover the value estimated by the jury, if the purchaser should do any act to obstruct or render impossible the valuation, as in *Clarke v. Westroppe*,<sup>2</sup> where the defendant had agreed to buy certain goods at a valuation, and the valuers disagreed, and the defendant thereupon consumed the goods, so that a valuation became impossible.

Valuation is not  
arbitration.

Where the parties have agreed to fix a price by the valuation of third persons, this is not equivalent to a submission to "arbitration," within the Common Law Procedure Act<sup>3</sup>

<sup>1</sup> *Thurnell v. Balbirnie*, 2 C. B. 786; *Cooper v. Shuttleworth*, 25 L. J., Ex. 114; *Vickers v. Vickers*, L. R. 4, Eq. 529; *Milnes v. Gery*, 14 Ves. 400; *Wilks v. Davis*, 3 Mcr. 507.

<sup>2</sup> 18 C. B. 765; 25 L. J., C. P. 287.

<sup>3</sup> *Collins v. Collins*, 26 Beav. 306; 28 L. J., Ch. 184; *Vickers v. Vickers*, L. R. 4, Eq. 529.

(17 & 18 Vict., c. 125, s. 12), and it was therefore held in *Bos v. Helsham*,<sup>1</sup> that where one party had appointed a valuer, and the other, after a notice in writing, had declined to do the same, as required by the contract, the 13th section of the Act did not apply, so as to authorise the valuer appointed, to act by himself as a sole arbitrator.

It has been held, however, that if the persons named as valuers accept the office or employment for reward or compensation, they are liable in damages to the parties to the contract for neglect or default in performing their duties.<sup>2</sup>

Responsibility  
of valuers.

In the civil law it was a settled rule that there could be no sale without a price certain. “*Pretium autem constitui oportet, nam nulla emptio sine pretio esse potest; sed et certum esse debet,*” was the language of the Institutes.<sup>3</sup> And it was a subject of long contest among the earlier juriconsults whether the necessity for a *certain* price did not render invalid an agreement that the price should be fixed by a third person: but Justinian put an end to the question by positive legislation: “*Alioquin si inter aliquos ita convenerit, ut quanti Titius rem æstimaverit tanti sit empti, inter veteres satis abundeque hoc dubitabatur sive constat venditio, sive non. Sed nostra decisio ita hoc constituit, ut quotiens sic composita sit venditio, quanti ille æstimaverit, sub hac conditione staret contractus: ut si quidem ipse qui nominatus est pretium definierit, omnimodo secundum ejus æstimationem et pretium persolvatur et res tradatur, et venditio ad effectum perducatur, emptore quidem ex empto actione, venditore ex vendito agente. Sin autem ille qui nominatus est, vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto. Quod jus, cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere.*”<sup>3</sup>

Civil law as to  
price.

<sup>1</sup> L. R., 2 Ex. 72; 36 L. J., Ex.

Shuttleworth, 25 L. J., Ex. 114.

<sup>2</sup> *Jenkins v. Beetham*, 15 C. B.

<sup>3</sup> Lib. iii. tit. xxiii. s. 1.

189; 24 L. J., C. P. 94; *Cooper v.*



These rules have been adopted into the Code Napoleon:—  
Art 1591—"Le prix de la vente doit être déterminé et désigné par les parties." 1592—"Il peut cependant être laissé à l'arbitrage d'un tiers: si le tiers ne veut ou ne peut faire l'estimation, il n'y a point de vente."

## PART II.

### SALES UNDER THE STATUTE OF FRAUDS.

#### CHAPTER I.

##### WHAT CONTRACTS ARE WITHIN THE STATUTE.

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Distinction between "sales" and			

THE common law which recognised the validity of verbal contracts of sale of chattels, for any amount, and however proven, was greatly modified by the statute of 29 Chas. II., c. 3. This celebrated enactment, familiarly known as the "Statute of Frauds," is now in force not only in England and most of our colonies, but exists, with some slight variations, in almost every State of the American Union. Its history was but imperfectly known till the year 1823, when Lord Eldon gave to Mr. Swanston, the reporter of his decisions, the MSS. of Lord Nottingham,<sup>1</sup> among which was his Lordship's report of the case of *Ash v. Abdy*,<sup>2</sup> in which he said, on the 13th June, 1678, less than

History of the statute.

<sup>1</sup> See note to *Crowley's case*, 2 Swans. 83.

<sup>2</sup> 3 Swans. 664, Appendix. In North's "Life of Lord Keeper Guilford," Vol. i. p. 108, he states of his lordship: "He had a great hand in the Statute of Frauds and Perjuries, of which the Lord Nottingham said that every line was worth a subsidy. But at that time the Lord Chief

Justice Hale had the preeminence, and was chief in the fixing of that law, although the urging part lay upon him, and I have reason to think it had the first spring from his lordship's notice." Lord Mansfield doubted the statement as to Sir Matthew Hale, who died before the bill was introduced. 1 Burr. 418.

two years after the passage of the law, that he over-ruled a demurrer to a bill which "was to execute a parol agreement, before the late act, for prevention of frauds and perjuries, but the bill itself was exhibited since the act." The ground of the decision was, that the statute was intended to be prospective solely, and not retrospective, "and I said, that I had some reason to know the meaning of this law, for it had its first rise from me, who brought in the bill into the Lords' House, though it afterwards received some additions and improvements from the judges and the civilians."<sup>1</sup>

The 17th section.

The section of the statute which is specially applicable to the subject of this Treatise is the 17th. In the examination of its provisions, and of the rules for its construction and application, the arrangement of Mr. Justice Blackburn will be followed, as not susceptible of improvement. The language of this 17th section is as follows:

"And be it enacted, that from and after the said four-and-twentieth day of June (A.D. 1677), no contract for the sale of any goods, wares, or merchandises, for the *price*<sup>2</sup> of ten pounds sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part-payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised."

What contracts embraced in it.

The first question that obviously presents itself under this enactment is, what contracts are embraced under the words, "contracts for the sale of any goods, &c." A contract may be perfectly binding between the parties, so as to give either of them a remedy against the person and general

<sup>1</sup> As to the traditions of the aid and co-operation of Lord Hale and Sir Leoline Jenkins, see *Wain v. Walters*, 3 East, 17; *Windham v. Chetwynd*, 1 Burr. 419; *Wynn's*

*Life of Sir Leoline Jenkins*, vol. i. p. 3.

<sup>2</sup> This word changed to "value," *post*, p. 70.

estate of the other in case of default, but having no effect to transfer the property or right of possession in the goods themselves, and therefore giving to the proposed purchaser none of the rights, and subjecting him to none of the liabilities of an owner; and this is an "Executory Agreement."

Or it may be a perfect sale, as already defined, conveying the absolute general property in the thing sold to the purchaser, entitling him to the goods themselves, independently of any personal remedy against the vendor for breach of contract, and rendering him liable to the risk of loss in case of their destruction; and this is a "Bargain and Sale of Goods."

The distinction between these two agreements will be more fully considered hereafter; but for the present it suffices to remark, that until the year 1828, the decisions were somewhat contradictory, and perhaps irreconcilable, on the question whether the words "contracts for the sale of any goods, &c.," in this section, were applicable to agreements for future delivery, that is to say, to executory agreements, or only to such as were equivalent to the common law contract, known as a bargain and sale. The decisions excluding such contracts from the operation of the statute were principally, *Towers v. Osborne*,<sup>1</sup> in 1724, *Clayton v. Andrews*,<sup>2</sup> in 1767, and *Groves v. Buck*,<sup>3</sup> in 1814. Those which upheld the contrary rule, were *Rondeau v. Wyatt*,<sup>4</sup> in 1792, *Cooper v. Elston*,<sup>5</sup> in 1796, and *Garbutt v. Watson*,<sup>6</sup> in 1822. The question is no longer open, for the Legislature intervened, and in 9 Geo. IV., c. 14, s. 7, known as "Lord Tenterden's Act," recited, that "it has been held that the said recited enactments" (i.e. the 17th sect. of the Statute of Frauds) "do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied," and then proceeded to enact that the provisions of the 17th

Lord Tenterden's Act.

<sup>1</sup> 1 *Strange*, 506.

<sup>2</sup> 4 *Burr.* 2101.

<sup>3</sup> 3 *M. & S.* 178.

<sup>4</sup> 2 *H. Bl.* 63.

<sup>5</sup> 7 *T. R.* 14.

<sup>6</sup> 5 *B. & A.* 613.

section "shall extend to all contracts for the sale of goods of the *value* of ten pounds sterling, and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

"Value" and  
"price."

It is settled in *Scott v. Eastern Counties Railway Company*,<sup>1</sup> and in *Harman v. Reeves*,<sup>2</sup> that this enactment must be construed as incorporated with the Statute of Frauds, and that its effect is to substitute the word "value" for "price" in the 17th section.

Distinction between "sales" and "work and labour done, and materials furnished."

There have been numerous decisions and much diversity, and even conflict of opinion, in relation to the proper principle by which to test whether certain contracts are "contracts for the sale, &c." under the 17th section, or contracts for work and labour done and materials furnished. A review of the cases will exhibit the different lights in which the subject has presented itself to the minds of eminent judges.

*Towers v. Osborne.*

*Towers v. Osborne*<sup>3</sup> was on an agreement to make and furnish a chariot. *Held* not within the statute. But the ground of decision in this case was, that the 17th section did not apply to executory agreements, and on this point the case is met by Lord Tenterden's Act.

*Clayton v. Andrews.*

In *Clayton v. Andrews*,<sup>4</sup> a contract for the future delivery of wheat not yet threshed was held not within the statute, under the authority of the preceding case.

*Groves v. Buck.*

In *Groves v. Buck*<sup>5</sup> the agreement was for the purchase by defendant of a quantity of oak pins, *not then in existence*, but that were to be cut by plaintiff out of slabs owned by him, and to be delivered at a future time. This agreement was held not to be embraced in the 17th section of the Statute of Frauds. Lord Ellenborough put his opinion on the ground that "*the subject matter of this contract did*

<sup>1</sup> 12 M. & W. 33.

<sup>2</sup> 18 C. B. 587, and 25 L. J., C. P. 257.

<sup>3</sup> 1 Strange, 506.

<sup>4</sup> 4 Burr. 2101.

<sup>5</sup> 3 M. & S. 178.

*not exist in rerum natura*: it was incapable of delivery and of part acceptance, and where that is the case, the contract has been considered not within the statute." This ground is again met by the 9 Geo. IV., c. 14, s. 7, but Dampier, J., in declining to apply the case of *Rondeau v. Wyatt* (presently noticed), said that this last-mentioned case was distinguishable, because in the other cases cited "some work was to be performed."

In *Rondeau v. Wyatt*,<sup>1</sup> where an executory contract was held to be within the statute, Lord Loughborough said, that "the case of *Towers v. Sir John Osborne* was plainly out of the statute, not because it was an executory contract, as has been said, but because it was *for work and labour to be done, and materials and other necessary things to be found*, which is different from a mere contract of sale, to which alone the statute is applicable." His Lordship also disposed of the case of *Clayton v. Andrews*,<sup>2</sup> (subsequently over-ruled in *Garbutt v. Watson*<sup>3</sup>) by saying that in that case also "there was some work to be performed, for it was necessary that the corn should be threshed before the delivery."

*Rondeau v.  
Wyatt.*

In *Garbutt v. Watson*,<sup>3</sup> where a sale of flour, to be manufactured out of wheat yet unground, was held to be within the statute, Abbott, C. J., said, that in *Towers v. Osborne*, "the chariot which was ordered to be made; *would never, but for that order, have had any existence.*" This expression, as well as the similar one by Lord Ellenborough in *Groves v. Buck* (ante, p. 70), would imply, that the distinction between a "contract for sale" and one for "work, labour, and materials," is tested by the inquiry, whether the thing transferred is one not in existence, and which would never have existed but for the order of the party desiring to acquire it, or a thing which would have existed, and been the subject of sale to some other person, even if the order had never been given. Bayley, J., however, put his opinion on the ground, that "this was substantially a contract for

*Garbutt v.  
Watson.*

<sup>1</sup> 2 H. Bl. 63.

<sup>2</sup> 5 B. & A. 613.

<sup>3</sup> 4 Burr. 2101.

the sale of flour, and it seems to me immaterial whether the flour was at the time ground or not. The question is, whether this was a contract for goods, or for work and labour and materials found. I think it was the former, and if so, it falls within the Statute of Frauds."

Holroyd, J., concurred "that this was a contract for the sale of goods," but neither of the judges gave a reason for this opinion (undoubtedly correct), and thus no aid is afforded by their language in furnishing a test for distinguishing the two contracts from each other.

Smith v. Surman.

In *Smith v. Surman*<sup>1</sup> an action was brought to recover the value of certain timber, under a verbal contract, by which plaintiff agreed to sell to defendant at so much per foot the timber contained in certain trees then growing on plaintiff's land. Bayley, J., was of opinion, that "this was a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, *was doing work for himself, and not for the defendant.*"

Atkinson v. Bell.

In *Atkinson v. Bell*<sup>2</sup> the whole subject was much discussed. The action was in assumpsit for goods sold and delivered, goods bargained and sold, work and labour done, and materials found and provided. The facts were, that one Kay had patented a certain machine, and the defendants, thread manufacturers, desiring to try it, wrote him *an order to procure to be made for them as soon as possible* some spinning-frames, in the manner he most approved of. Kay employed Sleddon to make them for the defendants, informing Sleddon of the order received by him, and he superintended the work. After the frames were made they lay for a month on Sleddon's premises, while he was doing some other work for the defendants under Kay's superintendence. Kay then ordered Sleddon to make some changes in the frames, and after this was done, the frames were put into boxes by Kay's directions, and remained in the boxes for some time on Sleddon's premises. On the 23d June,

<sup>1</sup> 9 B. & C. 568.

<sup>2</sup> 10 B. & C. 277.

Sleddon wrote to the defendants that the machines had been ready for three weeks, and asked how they were to be sent. On the 8th August, Sleddon became bankrupt, and his assignees required the defendants to take the machines; but they refused, whereupon action brought. The judges were all of opinion that the property in the goods had not vested in the defendants,<sup>1</sup> and that a count for goods bargained and sold could not be maintained; but Bayley and Holroyd, J. J., expressed the opinion that a count for not accepting would have supported the verdict in the plaintiff's favour. On the count for work and labour and materials, the judges were also unanimous that these had been furnished by Sleddon for his own benefit, and not for the defendant's, that is to say, that the contract was an executory agreement for sale, and not one for work, &c. Bayley, J., said, "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request, on your materials, he may maintain an action against you for work and labour done. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work, but when the chattel has assumed the character bargained for, and *the employer has accepted it*, the party employed may maintain an action for goods sold and delivered; or if the employer refuses to accept, a special action on the case for such refusal; but he cannot maintain an action for work and labour, *because his labour was bestowed on his own materials*, and for himself, and not for the person who employed him."

The concluding passage of this opinion is no doubt too broadly expressed, for although true generally, it is not universally the case that an action for work and labour will not

<sup>1</sup> On this subject see *post*, Book II.



lie when performed on materials that are the property of the workman. This inaccurate *dictum* had the effect for a time of weakening the authority of *Atkinson v. Bell*, subjecting it to the criticism of Maule and Erle, J. J., in *Grafton v. Armitage*,<sup>1</sup> and of Pollock, C.B., in *Clay v. Yates*,<sup>2</sup> but it was fully recognised in the subsequent case of *Lee v. Griffin*.<sup>3</sup>

*Grafton v.  
Armitage.*

*Grafton v. Armitage*<sup>1</sup> was a somewhat singular case. The plaintiff was a working engineer. The defendant was the inventor of a life-buoy, in the construction of which curved metal tubes were used. The defendant employed plaintiff to devise some plan for a machine for curving the tubes. The plaintiff made drawings and experiments, and ultimately produced a drum or mandrel, which effected the object required. His action was *debt* for work, labour, and materials, and for money due on accounts stated. The particulars were "for scheming and experimenting for, and making a plan-drawing of a machine, &c., engaged three days, at one guinea per day, £3 3s.; for workmen's time in making, &c., and experimenting therewith, £1 5s.; for use of lathe for one week, 12s.; for wood and iron to make the drum, and for brass tubing for the experiments, 5s." Defendant insisted, on the authority of *Atkinson v. Bell*, that the action should have been case for not accepting the goods, not debt for work and labour, &c., citing the *dictum* at the close of Bayley, J.'s, opinion. But Maule, J., said: "In order to sustain a count for work and labour, it is not necessary that the work and labour should be performed upon materials that are the property of the *plaintiff* (*sic.*, plainly meaning *defendant*), or that are to be handed over to him." Erle, J., said: "Suppose an attorney were employed to prepare a partnership or other deed, the draft would be upon his own paper, and made with his own pen and ink: might he not maintain an action for work and labour in preparing it?" In delivering the decision, Tindal, C. J.,

<sup>1</sup> 2 C. B. 336; 15 L. J., C. P. 20.

<sup>2</sup> 30 L. J., Q. B. 252; 1 B. & S.

<sup>3</sup> 25 L. J., Ex. 237; 1 H. & N. 272.

pointed out as the distinction, that in *Atkinson v. Bell*, the substance of the contract was that the machines to be manufactured were to be sold to the defendant, but that in the case before the Court the substance of the contract was not that plaintiff should manufacture the article for sale to the defendant, but that he should employ his skill, labour, and materials in devising for the use of defendant a mode of attaining a given object. Coltman, J., concurred, and said that the opinion of Bayley, J., was on "precisely the same ground as the Lord Chief Justice puts this case. The claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work or labour bestowed by him in the fabrication of them."

In *Clay v. Yates*,<sup>1</sup> the subject was treated by Pollock, C. B., in 1856, as a matter entirely *res nova*. The contract was that the plaintiff, a printer, should print for the defendant a second edition of a work previously published by the defendant, the plaintiff to find the materials, including the paper. Held, that this was not a contract for the sale of a thing to be delivered at a future time, nor a contract for making a thing to be sold when completed, but a contract to do work and labour, furnishing the materials; and that the case was not governed by Lord Tenterden's Act. Pollock, C. B., said: "As to the first point, whether this is an action for goods sold and delivered, and requiring a memorandum in writing, within the 17th section of the Statute of Frauds, I am of opinion that this is properly an action for work and labour, and materials found. I believe it is laid down in the commencement of *Chitty on Pleading*, that that is the count that may be resorted to by farriers, by medical men, by apothecaries, and I think he mentions surveyors distinctly, and that is the form in which they are in the habit of suing. The point made in the case cited, in which Bayley, J., gave an opinion (*Atkinson v. Bell*), I think may be answered by the opinion of Maule, J., in the Court of Common Pleas (*Grafton v. Armitage*); and then we have to

<sup>1</sup> 25 L. J., Ex. 237; 1 H. & N. 73.

decide the matter as if it were now without any authority at all. It may be that in all these cases, part of the materials is found by the party for whom the work is done, and the other part found by the person who is to do the work. There may be the case where the paper is to be found by one, and the printing by the other, and so on; the ink, no doubt, is always found by the printer. But it seems to me *the true rule is this, whether the work and labour is of the essence of the contract, or whether it is the materials that are found.* My impression is, that in the case of a work of art, whether it be silver or gold, or marble, or common plaster, that is a case of the application of labour of the highest description, and the material is of no sort of importance as compared with the labour, and therefore that all this would be recoverable as work and labour, and materials found. I do not mean to say the price might not be recovered as goods sold and delivered if the work were completed and sent home. No doubt it is a chattel that was bargained for and delivered, and it might be recovered as goods sold and delivered; but still it would not prevent the price being recovered as work and labour, and materials found. It appears to me, therefore, that this was properly sued for as work and labour, and materials found, and that the Statute of Frauds does not apply; and *I am rather inclined to think that it is only where the bargain is merely for goods thereafter to be made, and not where it is a mixed contract of work and labour, and materials found, that the Act of Lord Tenterden applies;* and one of the reasons why you find no cases on this subject in the books is, that before Lord Tenterden's Act passed, the Statute of Frauds did not apply to the case of a thing begun, whatever it might be."

Alderson, B., concurred, and Martin, B., said: "There are three matters of charge well known in the law—for labour simply, for work and materials, and another for goods sold and delivered. And I apprehend every case must be judged of by itself. What is the present case? The defendant having written a manuscript, takes it to the printer to have it printed for him. What does he intend to be done?

He intends that the printer shall use his types, and that he shall set them up by putting them in a frame; that he shall print the work on paper, and that the paper shall be submitted to the author; that the author shall correct it and send it back to the printer, and then the latter shall exercise labour again, and make it into a perfect and complete thing, in the shape of a book. I think the plaintiff was employed to do work and labour, and supply materials for it, and he is to be paid for it; and it really seems to me *that the true criterion is this: Supposing there was no contract as to payment, and the plaintiff had brought an action, and sought to recover the value of that which he had delivered, would that be the value of the book as a book?* I apprehend not, for the book might not be worth half the value of the paper it was written on. It is clear the printer would be entitled to be paid for his work and labour, and for the materials he had used upon the work; and, therefore, this is a case of work, labour, and materials, done and provided by the printer for the defendant." The learned Baron also put this case: "Suppose an artist paints a portrait for three hundred guineas, and supplies the canvas for it worth 10s., surely he might recover on a count for work and labour."

In *Lee v. Griffin*,<sup>1</sup> the last reported case, the foregoing *Lee v. Griffin.* opinions of the Chief Baron and Baron Martin were questioned, and not followed, though the *decision* was approved. This action was brought by a dentist, to recover 21*l.* for two sets of artificial teeth made for a deceased lady, of whom the defendant was executor. When *Clay v. Yates* was quoted by the plaintiff in support of the position that the skill of the dentist was the thing really contracted for, that the materials were only auxiliary, and that the count for work and labour was therefore maintainable, Hill, J., said: "*Clay v. Yates* is a case *sui generis*. The printer, the plaintiff there, in effect does work chiefly on the materials which the defendant supplied; although, to a certain extent, the plaintiff may be said to supply materials; moreover, the printer could not sell the book to any one else."

<sup>1</sup> 30 L. J., Q. B. 252; 1 B. & S. 272.

Crompton, J., said: "*When the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered.* The case of *Clay v. Yates* turned, as my brother Hill pointed out, upon the peculiar circumstances of the case. I have some doubt upon the propriety of the decision, but we should be bound by it in a case precisely similar in its circumstances, which the present is not. *I do not agree with the proposition, that wherever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labour, and not for the sale of a chattel.* It may be, the cause of action is for work and labour when the materials supplied are merely auxiliary, as in the case put of an attorney or printer. But in the present case, the goods to be furnished, viz., *the teeth, are the principal subject matter*; and the case is nearer that of a tailor, who measures for a garment, and afterwards supplies the article fitted."

Hill, J., said: "I think the decision in *Clay v. Yates* perfectly correct, according to the particular subject-matter of the contract in that case, which was not a case of a chattel ordered by one of another, thereafter to be made by the one and afterwards to be delivered to the other; but *when the subject-matter of the contract is a chattel to be afterwards delivered, then the cause of action is goods sold and delivered, and the seller cannot sue for work and labour.* In my opinion, *Atkinson v. Bell* is good law, subject only to the objection to the dictum of Bayley, J., which has been repudiated by Maule, J., and Erle, J., in *Grafton v. Armitage*."

Blackburn, J., said: "If the contract be such that *it will result in the sale of a chattel*, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But *if the work and labour be bestowed in such a manner as that the result would not be any thing which could properly be said to be the subject of sale, then an action for work and labour is the proper remedy.* In *Clay v. Yates*, the circumstances were peculiar; but had the contract been completed, it could scarcely perhaps have been

said that the result was the sale of a chattel. \* \* \* \*  
 I do not think that the relative value of the labour and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been the less for the sale of a chattel."

In reviewing these decisions, it is surprising to find that a rule so satisfactory and apparently so obvious as that laid down in *Lee v. Griffin*, in 1861, should not have been earlier suggested by some of the eminent judges who had been called on to consider the subject, beginning with Lord Ellenborough, in 1814, and closing with Pollock, C. B., in 1856. From the very definition of a sale, the rule would seem to be at once deducible, *that if the contract is intended to result in transferring for a price from B. to A. a chattel in which A. had no previous property, it is a contract for the sale of a chattel*, and unless that be the case, there can be no sale. In several of the opinions this idea was evidently in the minds of the judges. Especially was this manifest in the decision of Bayley, J., in *Atkinson v. Bell*, and Tindal, C. J., in *Grafton v. Armitage*; but it was not clearly and distinctly brought into view before the decision in *Lee v. Griffin*. The same tentative process for arriving at the proper distinctive test between these two contracts has been gone through in America, but without a satisfactory result, as will subsequently appear.

Remarks on the cases.

The principles suggested as affording a test on this subject prior to the case of *Lee v. Griffin* were the following:—

1st.—That if the subject-matter of the contract was not in existence, not *in rerum naturá*, as Lord Ellenborough expressed it, the contract was not "for the sale of goods." This was the opinion of Lord Ellenborough in *Groves v. Buck*; <sup>1</sup> of Abbott, C. J., as shown by his comment on *Towers v. Osborne*, in the opinion delivered in *Garbutt v.*

<sup>1</sup> 3 M. & S. 178.

Watson ;<sup>1</sup> and may be inferred from *Rondeau v. Wyatt*,<sup>2</sup> to have been the opinion of Lord Loughborough.

That the decision in *Towers v. Osborne* was wrong, if it went upon the ground that Lord Loughborough states, viz., that the order for the chariot was not a contract or agreement for the sale of a chattel, is no longer questionable. The familiar example put by the judges in several of the cases, of an order to a tailor or shoemaker for a garment or pair of shoes, both of which are treated as undoubted cases of contracts for the sale of chattels, is exactly the same as the order in *Towers v. Osborne*. The intention of the parties was that the result should be a transfer for a price, by Towers to Sir John Osborne, of a chattel in which Sir John had no previous property, and this was clearly a contract for a sale.

2.—The second principle suggested as the true test, was by Bayley, J., first in *Smith v. Surman*,<sup>3</sup> afterwards more fully developed in *Atkinson v. Bell*,<sup>4</sup> viz., that if the materials be furnished by the employer, the contract is for work and labour, not for a sale ; but if the material be furnished by the workman who makes up a chattel, he cannot maintain “work and labour,” because his labour was bestowed on his own materials and for himself, and not for the person who employed him. The first branch of this rule is undoubtedly correct, as shown by the principles settled in *Lee v. Griffin*, because where the materials are furnished by the employer, there can be no transfer to him of the property in the chattel, he being previously possessed of the title to the materials, so that nothing *can* be due from him save compensation for labour ; and this will be equally true where the employer has furnished only part of the materials, for the contract in such case cannot result in a sale to him of what is already his, and the only other action possible would be for work and labour done, and materials furnished. But the second part of the rule is inaccurate, as pointed out in *Grafton v. Armitage* and *Lee v. Griffin*. A man may be

<sup>1</sup> 5 B. & A. 613.

<sup>2</sup> 2 H. B. 63.

<sup>3</sup> 9 B. & C. 568.

<sup>4</sup> 10 B. & C. 277.

responsible for damage done to another's chattel, as, for example, to a coachmaker's vehicle, and may employ the latter to repair the injury, in which case an action would plainly lie against the employer for the work and labour done, and materials furnished by the coachbuilder, although bestowed on a thing which is his, and is to remain his after being repaired at another's expense.

3rd.—The third attempt to supply the true test on this matter, previously to its satisfactory settlement in *Lee v. Griffin*, was made by Pollock, C. B., in *Clay v. Yates*.<sup>1</sup> The proper rule, in his opinion, is this: "Whether the work and labour is of the essence of the contract, or whether it is the materials that are found." This test was decisively rejected by Crompton and Blackburn, J.J., in *Lee v. Griffin*. It cannot be supported, even in the extreme case put by Martin, B., of a portrait worth 300 guineas on a canvas worth 10s. If the employer owned nothing whatever that went into the composition of the picture—if neither materials, nor skill, nor labour were supplied by him, it is obvious that he cannot get title to the picture or any property in it, except through a transfer of the chattel to him by the artist for a price, and this is in law a contract of sale. It cannot make the slightest difference in what proportions the elements that compose the chattel, namely, the raw material and the skill, are divided; it is not the less true, that none of these elements were owned by the employer before the contract, and that the chattel composed of them is by the terms of the contract to be transferred for a price by the former owner to the employer. The test suggested by Martin, B., in his opinion as found in the Law Journal Report, is accurate as far as it goes, but it does not cover more than the point in the case before the court. The learned Baron said: "Suppose the plaintiff had brought an action to recover the value of that which he had delivered, would that be the value of the book? I apprehend not, for the book might not be worth half the value of the paper it

<sup>1</sup> 25 L. J., Ex. 237; 1 H. & N. 73.



was written on." This is true, and why? Because a part of the materials of the book—its chief materials, indeed—to wit, the composition, had been furnished by the employer, belonged to him already, and therefore *could* not be sold to him by the printer. The only remedy then remaining was an action for work and labour and materials.

Cases are sometimes put, as a test of principles, that are so extreme as to be best disposed of by the application of the familiar rule, "*de minimis non curat lex*." Thus the example of an attorney employed to draw a deed, is dismissed by Blackburn, J., in *Lee v. Griffin*, with the simple remark that it is an abuse of language to say that the paper or parchment are goods sold and delivered. So, if a man send a button or a skein of silk to be used in making a coat, it would be mere trifling to say that he was part owner of the materials, and that an action for goods sold would not therefore lie in favour of the tailor who furnished the garment. Such matters cannot be considered as having entered into the contemplation of parties when contracting, nor as forming any real part of the consideration for the mutual stipulations.

A chattel intended for a fixture to a freehold.

Where a contract is made for furnishing a machine or a moveable thing of any kind *and fixing it to the freehold*, it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of moveables, but to make improvements on the real property, and the consideration to be paid to the workman is not for a transfer of chattels, but for work and labour done and materials furnished in adding something to the land.<sup>1</sup>

Law in America.

In America, as before observed, the same perplexity has been exhibited as marks the history of the subject in our own law, and in *Lamb v. Crafts*,<sup>2</sup> Chief Justice Shaw said, "The distinction we believe is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or

Cotterell v. Apsley, 6 Taunt. 248.  
322; Tripp v. Armitage, 4 M. & W.      <sup>2</sup> 12 Metcalf, 356.  
687; Clark v. Bulmer, 11 M. & W.

finished, it is essentially a contract of sale and not a contract for labour; otherwise when the article is made pursuant to the agreement." This opinion seems to have been deduced from some observations of Abbott, C. J., in *Garbutt v. Watson*, and rests on no satisfactory principle. Mr. Story, whose treatise in the last edition of 1862 contains no reference to the then recent case of *Lee v. Griffin*, avows his difficulty, and suggests that it would probably be held "that where the labour and service were the essential considerations, as in the case of the manufacture of a thing not *in esse*, the contract would not be within the statute; where the labour and service were wholly incidental to a subject matter *in esse*, the statute would apply."<sup>1</sup> This is the rule suggested by Pollock, C. B., in *Clay v. Yates*, and rejected in *Lee v. Griffin*.

In Mr. Hilliard's Treatise on Sale, the contradictory decisions are given without any attempt on the part of the learned author to reconcile them or deduce any general principle applicable to the controverted question.<sup>2</sup>

It was at one time questioned whether sales of goods by public auction were embraced within the statute. Lord Ellenborough's strong *dicta* in *Hinde v. Whitehouse*,<sup>3</sup> in 1806, seem to have put an end to the doubt, and the authority of that case was recognised in *Kenworthy v. Schofield*,<sup>4</sup> so that the question suggested on this point by Lord Mansfield in *Simon v. Motivos*,<sup>5</sup> has long been at rest.

<sup>1</sup> Story on Sales, p. 274, s. 260 c.

<sup>4</sup> 2 B. & C. 945.

<sup>2</sup> Hilliard on Sales, p. 464-7.

<sup>5</sup> 3 Burr. 1921, and 1 W. Bl. 599.

<sup>3</sup> 7 East, 558.

## CHAPTER II.

### WHAT ARE GOODS, WARES, AND MERCHANDISE.

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THE 17th section of the statute applies to contracts for the sale of "goods, wares, and merchandise," words which comprehend all corporeal moveable property.

Choses in action not within the statute.

The statute, therefore, does not apply to shares, stocks, documents of title, choses in action, and other incorporeal rights and property. The following cases have been decided on this point:—

The statute does not apply to a sale of shares in a joint stock banking company, *Humble v. Mitchell*; <sup>1</sup>

Nor to a sale of stock of a foreign state, *Heseltine v. Siggers*; <sup>2</sup>

Nor to a sale of railway shares, *Tempest v. Kilner*, <sup>3</sup> *Bowlby v. Bell*, <sup>4</sup> *Bradley v. Holdsworth*, <sup>5</sup> and *Duncroft v. Albrecht*; <sup>6</sup>

Nor of shares in a mining company on the cost-book principle, *Watson v. Spratley*, <sup>7</sup> *Powell v. Jessop*. <sup>8</sup>

<sup>1</sup> 11 A. & E. 205.

<sup>2</sup> 1 Exch. 856.

<sup>3</sup> 3 C. B. 249.

<sup>4</sup> 3 C. B. 284.

<sup>5</sup> 3 M. & W. 422.

<sup>6</sup> 12 Sim. 189

<sup>7</sup> 10 Exch. 222, and 24 L. J., Ex. 53.

<sup>8</sup> 18 C. B. 336, and 25 L. J., C. P. 199.

Most of the foregoing decisions went upon the ground that the sales were of choses in action not properly embraced in the words "goods, wares, and merchandise," but some turned upon other enactments, to which it will now be convenient to refer. These are, *first*, the 4th section of the Statute of Frauds, and *secondly*, the exemption in the Stamp Act, of agreements relating to the sale of goods, wares, and merchandise.

The 4th section<sup>1</sup> of the Act of 29 Car. II. c. 23, enacts, "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; *or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them*; or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

4th section  
of Statute of  
Frauds.

The Stamp Act, 55 Geo. III. c. 184, in the schedule, title "Agreements," exempts from stamp duties every "memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandise."

Stamp laws.

It is often important to determine whether a sale of certain articles, attached to the soil, such as fixtures and growing crops, is governed by the 17th section as being a sale of "goods, wares, and merchandise," or by the 4th section, as a sale of an "interest in or concerning land." Though these two sections, on a cursory perusal, might seem to be

Difference be-  
tween 4th and  
17th sections.

<sup>1</sup> It was held in *Le Roux v. Brown* (12 C. B. 801, and 22 L. J., C. P. 1), that this section is applicable to a contract made in a foreign country.

See remarks on the case by Willes, J., in *Gibson v. Holland*, L. R. 1, C. P. 1; 35 L. J., C. P. 5.

substantially the same, both requiring some written note or memorandum, signed by the party to be charged, a more attentive consideration will show very material distinctions. Agreements under the fourth section require a written note or memorandum, under all circumstances, and for any amount or value. But under the 17th section, the necessity for the writing does not exist when the value is under 10*l.*, and it may be dispensed with in contracts for larger sums, by proof of part acceptance or part payment by the buyer, or by the giving of something in earnest to bind the bargain. Again, a contract for sale under the 17th section is exempt from stamp duty, but if the agreement be for a sale of any "interest in or concerning land," a stamp is required. Practically, therefore, the whole controversy between the parties to an action is often finally disposed of by this test.

What is an interest in land under the 4th section.

Complaint has been made at different times of the unsatisfactory character of the decisions in which the courts have sought to establish rules distinguishing with accuracy and certainty whether a contract for the sale of things attached to the soil be or not a sale of an interest in land within the fourth section. Lord Abinger, in 1842, gave expression to this complaint in a somewhat exaggerated form when he said, "It must be admitted, taking the cases altogether, that no general rule is laid down by any one of them, that is not contradicted by some other."<sup>1</sup>

Before entering upon an examination of the decisions, it will conduce to a proper understanding of the subject to transcribe in full the remarks of Mr. Justice Blackburn on the general principles of law involved in the question.

"The statutes are now applicable to all contracts for the sale of 'goods, wares, and merchandise,' words which, as has been already said, comprehend all tangible moveable property; I say moveable property, for things attached to the soil are not goods, though when severed from it they are; thus, growing trees are part of the land, but the cut

<sup>1</sup> Rodwell v. Phillips, 9 M. & W. 505.

logs are goods; and so, too, bricks or stones which are goods, cease to be so when built into a wall,—they then become a part of the soil. Fixtures, and those crops which are included amongst emblements, though attached to the soil, are not for all purposes part of the freehold.

“It seems pretty plain upon principle that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9 Geo. IV. c. 14, if not of the 29 Car. II. c. 3. The agreement is, that the thing shall be rendered into goods, and then in that state sold: it is an executory agreement for the sale of goods not existing in that capacity at the time of the contract. And when the agreement is, that the property is to be transferred before the thing is severed, it seems clear enough that it is *not* a contract for the sale of goods: it is a contract for a sale, but the thing to be sold is not goods. If this be the principle, the true subject of inquiry in each case is, when do the parties intend that the property is to pass? If the things perish by inevitable accident before the severance, whom do they mean to bear the loss? for in general that is a good test of whether they intend the property to pass or not; in other words, if the contract be for the sale of the things after they have been severed from the land, so as to become the subject of larceny at common law, it is, at least since the 9 Geo. IV. c. 14, a contract for the sale of goods, wares, and merchandise, within the seventeenth section. On the whole the cases are very much in conformity with these distinctions, though there is some authority for saying that a sale of emblements or fixtures, vesting an interest in them whilst in that capacity and before severance, is a sale of goods within the meaning of the seventeenth section of the Statute of Frauds, and a good deal of authority that such a sale is not a sale of an interest in land within the fourth section, which may, however, be the case, though it is not

a sale of goods, wares, and merchandise, within the seventeenth."<sup>1</sup>

Nothing is to be found in the cases reported since this perspicuous exposition was published, to affect its accuracy, or to shake the deductions drawn by the learned author from the authorities then extant. There can be little hazard, therefore, in laying down the rules that govern this subject, supporting them by the appropriate decisions, and calling attention to such cases as seem to conflict with the general current of authority.

First principle.  
Where growing  
crop is to be  
severed before  
property passes.

*The first principle then is, that an agreement to transfer the property in any thing attached to the soil at the time of the agreement, but which is to be severed from the soil, and converted into goods, BEFORE the property is transferred to the purchaser, is an agreement for the sale of goods, an executory agreement, governed by Lord Tenterden's Act, and therefore within the 17th section.*

Smith v. Surman.

In *Smith v. Surman*<sup>2</sup> the agreement was to sell standing timber, which the proprietor had begun to cut down, two trees having already been felled, at so much a foot. Held to be within the 17th section. Bayley, B., in referring to this case, in *Earl of Falmouth v. Thomas*,<sup>3</sup> lays stress on the fact, "that the *seller* was to cut down; the timber was to be made a chattel by the *seller*."

Parker v. Staniland.

In *Parker v. Staniland*<sup>4</sup> the sale was by the plaintiff of all the potatoes on a close of two acres, at 4s. 6d. a sack, and the defendant was to get them immediately. Here, also, it was held that there was a sale of chattels, and no transfer of any interest in the land; but both Lord Ellenborough and Mr. Justice Bayley put the case on the ground that the potatoes were to be taken away *immediately*, and to gain nothing by further growth in the soil; and they made this fact the ground for distinguishing the case from *Crosby v. Wadsworth*,<sup>5</sup> and *Waddington v. Bristow*,<sup>6</sup> where sales of

<sup>1</sup> Black. on Sales, 9-10.

<sup>2</sup> 9 B. & C. 561.

<sup>3</sup> 1 C. & M. 105.

<sup>4</sup> 11 East, 362.

<sup>5</sup> 6 East, 602.

<sup>6</sup> 2 B. & P. 452.

growing crops of grass had been held to come under the 4th section.

In *Warwick v. Bruce*,<sup>1</sup> decided by the King's Bench in 1813, which was followed by *Sainsbury v. Matthews*,<sup>2</sup> in the Exchequer, in 1838, the sale was of potatoes *not mature*, and that were to be dug by the *purchasers* when ripe, in the former case for a gross sum, and in the latter at 2s. per sack; and in both cases the distinctions suggested in *Smith v. Surman*, and *Parker v. Staniland*, were disregarded; and the sale in *Warwick v. Bruce* was held not to be of an interest in land under the 4th section, while the decision in the Exchequer case went the full length of deciding that the sale was one of goods and chattels, governed by the 17th section. The distinction between crops of mature and immature *fructus industriales* was also expressly repudiated by Littledale, J., in *Evans v. Roberts*.<sup>3</sup>

*Warwick v. Bruce.*  
*Sainsbury v. Matthews.*

In *Washburn v. Burrows*,<sup>4</sup> where the pleadings averred that certain crops of grass, growing on a particular estate, were assigned as security, it became necessary to inquire whether this averment necessarily implied the transfer of an interest in land. The Court, after taking time to consider, intimated that this plea would be satisfied by proving that the grass was to be severed from the soil, and delivered as a chattel. Rolfe, B., in delivering the judgment, said, "Certainly, where the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel."

*Washburn v. Burrows.*

In most of the foregoing cases it will be observed, that under the contracts the property in the thing sold remained in the vendor till after severance. In *Smith v. Surman*, the price depended on the measurement of the timber after

<sup>1</sup> 2 M. & S. 205.

<sup>2</sup> 5 B. & C. 836.

<sup>3</sup> 4 M. & W. 343.

<sup>4</sup> 1 Exch. 107.



cutting it, for it was sold at so much a foot: and in *Parker v. Staniland*, and *Sainsbury v. Matthews*, the potatoes were also to be measured after being gathered, in order to determine the price. If the thing sold had been destroyed before measurement, the loss would have fallen on the vendor, because the property remained in him. *Post*, Book II., Chap. 3. The bargain therefore was simply that the things sold were to be severed and converted into chattels before the sale took effect, and fell under the first principle above stated. But *Warwick v. Bruce* is governed by the rule next to be stated.

Second principle. Where property passes before severance.

If *fructus naturales*, 4th sec. applies.

If *fructus industriales*, 17th sec. applies.

*Evans v. Roberts*.

The second principle on this subject is, that where there is a perfect bargain and sale, vesting the property at once in the buyer before severance, a distinction is made between the natural growth of the soil, as grass, timber, fruit on trees, &c. &c., which at common law are part of the soil, and *fructus industriales*, fruits produced by the annual labour of man, in sowing and reaping, planting and gathering. The former are an interest in land, embraced in the 4th section; the latter are chattels, for at common law a growing crop, produced by the labour and expense of the occupier of lands, was, as the representative of that labour and expense, considered an independent chattel.<sup>1</sup>

The first and leading case in which this distinction was fully considered, was *Evans v. Roberts*.<sup>1</sup> A verbal contract was made, by which the defendant agreed to purchase of the plaintiff, a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of 5*l.*, and the defendant paid one shilling earnest. The action was *assumpsit* "for crops of potatoes bargained and sold," and it was objected that this was a contract of sale of an interest in or concerning land, within the meaning of the 4th section of the Statute of Frauds.

Bayley, J., said, "I am of opinion that in this case there was not a contract for the sale of any lands, tenements, or hereditaments, or any interest in or concerning them, but

<sup>1</sup> *Per* Bayley, J., in *Evans v. Roberts*, 5 B. & C. 836.

a contract only for the sale or delivery of things, which, at the time of the delivery, should be goods and chattels. It appears that the contract was for a cover of potatoes; *the vendor was to raise the potatoes from the ground*, at the request of the vendee. The effect of the contract, therefore, was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete. Most of the authorities cited in the course of the argument to show that this contract gave the vendee an interest in the land, within the meaning of the fourth section of the Statute of Frauds, are distinguishable from the present case. In *Crosby v. Wadsworth*,<sup>1</sup> the buyer did acquire an interest in the land, for by the terms of the contract *he was to mow the grass*, and must therefore have had possession of the land for that purpose. Besides, in that case the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Now, growing grass does not come within the description of goods and chattels, and cannot be seized as such under a *fi. fa.*; it goes to the heir, and not to the executor; but growing potatoes come within the description of emblements, and are deemed chattels by reason of their being raised by labour and manurance. They go to the executor of tenant in fee simple, although they are fixed to the freehold,<sup>2</sup> and may be taken in execution under a *fi. fa.* by which the sheriff is commanded to levy the debt of the *goods and chattels* of the defendant: and if a growing crop of potatoes be chattels, then they are not within the provisions of the fourth section of the Statute of Frauds, which relate to lands, tenements, or hereditaments, or any interest in or concerning them." And again, at p. 835, "It has been insisted that the right to have the potatoes remain in the ground is an interest in the land, but a party entitled to emblements has the same

<sup>1</sup> 6 East, 602.

<sup>2</sup> Com. Dig. tit. *Biens* (G).

right, and yet he is not by virtue of that right considered to have any interest in the land. For the land goes to the heir, but the emblements go to the executor. In Tidd's Practice, 1089, it is laid down, that under a *feri facias* the sheriff may sell *fructus industriales*, as corn growing, which goes to the executor, or fixtures, which may be removed by the tenant; but not furnaces, or apples upon trees, which belong to the freehold, and go to the heir. The distinction is between those things which go to the executor, and those which go to the heir. The former may be seized and sold under the *fi. fa.*, the latter cannot. *The former must therefore, in contemplation of law, be considered chattels."*

At the close of his opinion, the learned judge said: "I am of opinion that there was not in this case any contract or sale of lands, &c., but that there was a contract for the sale of goods, wares, and merchandise, within the meaning of the 17th section, though not to the amount which makes a written note or memorandum of the bargain necessary."

Holroyd, J., said: "The contract being for the sale of the produce of a given quantity of land, was a contract to render what afterwards would become a chattel."

Littledale, J., was as explicit as Bayley, J., in taking the distinction above pointed out. He said, p. 840: "This contract only gives to the vendee an interest in that growing produce of the land which constituted its annual profit. Such an interest does not constitute part of the realty. \* \* Lord Coke in all cases distinguishes between the land and the growing produce of the land: he considers the latter as a personal chattel independent on, and distinct from, the land. If, therefore, a growing crop of corn does not in any of these cases constitute any part of the land, I think that a sale of any growing produce of the earth (reared by labour and expense), in actual existence at the time of the contract, whether it be in a state of maturity or not, is not to be considered as a sale of an interest in or concerning land within the meaning of the fourth section of the Statute of Frauds; but a contract for the sale of goods, wares, and merchandise, within the 17th section of that statute."

In *Jones v. Flint*,<sup>1</sup> decided in 1839, *Evans v. Roberts* was followed and approved, on the ground of the distinction between *fructus industriales*, which are chattels, and the natural growth of grass, &c., which are part of the freehold; and any distinction between crops mature and immature, as well as between cases where the buyer or the seller is to take the crop out of the ground, was expressly rejected. In both cases also the earlier *dictum* of Sir James Mansfield, in *Emmerson v. Heelis*<sup>2</sup> is practically overruled.

The two cases of *Evans v. Roberts* and *Jones v. Flint*, have remained unquestioned to the present time as authority for the rule that *fructus industriales*, even when growing in the soil, are chattels; while another series of decisions have maintained the principle that the natural growth of the land is part of the freehold, and that contracts for the sale of it, transferring the property before severance, are governed by the fourth section.

In *Rodwell v. Phillips*,<sup>3</sup> a written sale of "all the crops of fruit and vegetables of the upper portion of the garden, from the large pear-trees, for the sum of £30," the purchaser having paid down £1 as deposit, was held by Lord Abinger to be the sale of an interest in land; but the *ratio decidendi* was that it certainly was not such a contract for the sale of goods, wares, and merchandise as under the Stamp Act was exempted, and the plaintiff was non-suited, the agreement not being stamped.

In *Campbell v. Roots*,<sup>4</sup> plaintiff, in May, made a verbal agreement to buy a crop of grass growing on a certain close, to be cleared by the end of September, at £5 10s. per acre: half the price to be paid down before any of the grass was cut. Held, by all the judges, to be void under the fourth section. This case is in entire conformity with *Crosby v. Wadsworth*,<sup>5</sup> where Lord Ellenborough held a similar contract to be an agreement for the sale of an interest in land,

<sup>1</sup> 10 Ad. & E. 753.

<sup>4</sup> 2 M. & W. 248.

<sup>2</sup> 2 Taunt. 38.

<sup>5</sup> 6 East, 602.

<sup>3</sup> 9 M. & W. 502.

“conferring an exclusive right to the vesture of the land during a limited time and for given purposes.”

Scovell v.  
Boxall.

Teal v. Auty.

In *Scovell v. Boxall*,<sup>1</sup> a parol contract for the purchase of standing underwood, to be cut down by the purchaser, and in *Teal v. Auty*,<sup>2</sup> an unstamped agreement for the sale of growing poles, were held to be agreements for the sale of an interest in land. In the former case, *Hullock, B.*, cited with approval, and recognised as authority, the case of *Evans v. Roberts*.<sup>3</sup>

In all of these cases it will be remarked that the distinction pointed out by Mr. Justice Blackburn in his treatise is found to prevail. In *Rodwell v. Phillips*, the whole crop of fruit on the trees; in *Campbell v. Roots*, and *Crosby v. Wadsworth*, the whole growth of grass on the land; and in *Scovell v. Boxall*, and *Teal v. Auty*, the standing undergrowth and the growing poles, were all transferred to the purchasers *before severance* from the soil.

From all that precedes, the law on the subject of the sale of growing crops may be summed up in the following proposition, viz.:—

General proposition as to growing crops.

Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the 4th section of the Statute of Frauds. Growing crops, if *fructus naturales*, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the purchaser before severance, is governed by the 4th section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the 17th, and not by the 4th section of the statute.

Are *fructus industriales* goods, &c. while growing?

Whether *fructus industriales* while still growing are not only chattels, but “goods, wares, and merchandise,” has

<sup>1</sup> 1 Y. & Jerv. 396.

<sup>2</sup> 2 Br. & B. 101.

<sup>3</sup> 5 B. & C. 836.

not, it is believed, been directly decided. Both Bayley, J., and Littledale, J., expressed an opinion in the affirmative in *Evans v. Roberts* (*supra*, pp. 90—92), and Mr. Taylor, in his *Treatise on Evidence*,<sup>1</sup> treats the proposition as being perfectly clear in the same sense. Blackburn, J., on the contrary,<sup>2</sup> says that the proposition is “exceedingly questionable,” and that no authority was given for it in *Evans v. Roberts*. Mr. Taylor cites no authority for his opinion. The cases bearing on this point are *Mayfield v. Wadsley*,<sup>3</sup> and *Hallen v. Runder*.<sup>4</sup> In the former, an outgoing tenant obtained a verdict, which was upheld, on a count for crops bargained and sold against an incoming tenant, who had agreed to take them at a valuation; and in the latter, counts for fixtures bargained and sold were held sufficient; but Blackburn, J., observes on these cases, first, that in *Hallen v. Runder* the Court expressly decided that an agreement for the sale of fixtures between the landlord and the outgoing tenant was not a sale of *goods*, either within the Statute of Frauds, or the meaning of a count for goods sold and delivered; and *secondly*, that in both cases the land itself was to pass to the purchaser, and the agreement was, therefore, rather an abandonment of the vendor’s right to diminish the value of the land than a sale of any thing. The learned author in another passage,<sup>5</sup> says that “they are certainly chattels, but they are not *goods*, but are so far a part of the soil, that larceny at common law could not be committed on them,” and Lord Ellenborough was also of this opinion.<sup>6</sup> This point must, it is apprehended, be considered as still undetermined.

*Mayfield v.*  
*Wadsley.*  
*Hallen v. Runder.*

It is sometimes a matter of doubt whether growing crops are properly comprehended in the class of *fructus industriales* or *fructus naturales*. There is an intermediate class of products of the soil, not annual, as emblements, not permanent, as grass or trees, but affording either no crop till

Intermediate  
class of crops.

<sup>1</sup> Taylor on Ev. 891, s. 953, Ed. 1864.

<sup>4</sup> 1 C. M. & R. 267.

<sup>5</sup> Black. p. 17.

<sup>2</sup> Black. on Sales, pp. 19, 20.

<sup>6</sup> See his decision in *Parker v.*

<sup>3</sup> 3 B. & C. 357.

*Stanland*, 11 East, 365.

the second or third year, or affording a succession of crops for two or three years before they are exhausted, such as madder, clover, teasles, &c. The only reported case on this subject is *Graves v. Weld*,<sup>1</sup> which was argued by very able counsel, and decided, after consideration, by Lord Denman, who delivered the unanimous judgment of the Court, consisting of himself and Littledale, Parke, and Patterson, JJ. The facts were that the plaintiff was possessed of a close under a lease for ninety-nine years, *determinable on three lives*. In the spring of 1830, the plaintiff sowed the land with barley, and in May he sowed broad clover seed with the barley. The last of the three lives expired on the 27th July, 1830, the reversion being then in defendant. In January, 1831, plaintiff delivered up the close to the defendant, but in the meantime had taken off, in the autumn of 1830, the crop of barley, in mowing which a little of the clover plant, that had sprung up, was cut off, and taken together with the barley. According to the usual course of good husbandry, broad clover is sown about April or May, and is fit to be taken for hay about the beginning of June of the following year. The clover in question was cut by defendant about the end of May, 1831, more than a twelvemonth after the seed had been sown. The defendant also took, according to the common course of husbandry, a second crop of the clover in the autumn of the same year, 1831. The jury found, on questions submitted by the judge: 1st.—That the plaintiff did not receive a benefit from taking the clover with the barley straw sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. 2nd.—That a prudent and experienced farmer, knowing that his term was to expire at Michaelmas, would not sow clover with his barley in the spring, where there was no covenant that he should do so; and would not in the long run and on the average, repay himself in the autumn for the extra cost he had incurred in the spring.

<sup>1</sup> 5 B. & Ad. 105.

The case was argued by Follett for plaintiff, and Gambier for defendant, and Lord Denman, in delivering the judgment of the whole Court, said : " In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was that the tenant should be encouraged to cultivate by being sure of the fruits of his labour ; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labour, or the right might be extended in that case to things of a more permanent nature, as trees, or to more crops than one ; for the cultivator very often looks for a compensation for his capital and labour in the produce of successive years. It was therefore admitted by each that the tenant would be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest ; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labour by which it is produced within the year in which that labour is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. *And the latter proposition we consider to be law.*"

Again, " The principal authorities upon which the law of emblements depends are Littleton, sec. 68, and Coke's Commentary on that passage. The former is as follows : ' If the lessee soweth the land, and the lessor, after it is sown and before the corne is ripe, put him out, yet the lessee shall have the corne and shall have free entry, egress and regress to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him.' Lord Coke says (Co. Litt. 55 a), ' The reason of this is, for that the estate of the lessee is uncertaine, and therefore lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed, in peace, albeit the lessor doth deter-



mine his will before it be ripe. And so it is if he set rootes or sow hempe or flax or any other *annuall* profit, if *after the same be planted*, the lessor oust the lessee, or if the lessee dieth, yet he or his executors shall have *that yeare's crop*. But if he plant young fruit trees or young oaks, ashes, elms, &c., or sow the ground with acornes, &c., there the lessor may put him out notwithstanding, because they will yield *no present annuall profit*.' These authorities are strongly in favour of the rule contended for by defendant's counsel; they confine the right to things yielding present *annual* profit, and to that year's crop which is growing when the interest determines. The case of hops, which grow from ancient roots and which yet may be emblements, though at first sight an exception, really falls within this rule. In *Latham v. Atwood*,<sup>1</sup> they were held to be *like* emblements, because they were 'such things as grow by the manurance and industry of the owner, by the making of hills and setting poles:' that labour and expense, without which they would not grow at all, seem to have been deemed equivalent to the sowing and planting of other vegetables."

According to the principles here established, it would seem that the crop of the first year in such cases would be *fructus industriales*, but that of subsequent years, like fruit on trees planted by tenants, would be *fructus naturales*, unless requiring cultivation, labour, and expense for each successive crop, as hops do, in which event they would be *fructus industriales* till exhausted. But the law as to the application of the Statute of Frauds to sales of growing crops of this character, especially of crops subsequent to the first gathered, cannot be considered as settled.

Crop not yet  
sown.  
*Watts v.*  
*Friend*.

A singular case of the sale of a crop not yet sown was determined in *Watts v. Friend*.<sup>2</sup> The bargain was, that the plaintiff should furnish the defendant with turnip-seed to be sown by the latter on his own land, and that the defendant should then sell to the plaintiff the whole of the

<sup>1</sup> Cro. Car. 515.

<sup>2</sup> 10 B. & C. 446.

seed produced from the crop thus raised at a guinea a bushel. The contract was held to be within the 17th section of the Statute of Frauds. The amount of the seed produced turned out to be 240 bushels, and as the agreement was that the crop should be severed before the property was transferred, it was clearly not a sale of an interest in land; but the reporter, in a note to the case, calls attention to a point not discussed in it, viz., that when the bargain was made, it was *uncertain* whether the value of the seed to be produced would reach 10*l.*, and that under the 4th section it had been held, that cases depending on contingencies which may or may not happen within the year, are not within that section, though the event does not in fact happen within the year.

In the *Earl of Falmouth v. Thomas*,<sup>1</sup> where a farm was leased, and the tenant agreed to take the growing crops and the labour and materials expended, according to a valuation, it was held that the whole was a contract for an interest in land under the 4th section, and that plaintiff could not maintain an *indebitatus* count for goods bargained and sold to recover the price of the crops according to the valuation. Littledale, J., expressed the same opinion in *Mayfield v. Wadsley*,<sup>2</sup> saying that "where the land is agreed to be sold, and the vendee takes from the vendor the growing crops, the latter are considered part of the land." This rule seems founded on sound principles, for in such cases the fact of his having acquired an interest in the land is part of the consideration which moves the purchaser to buy the crops; or as it is put in *Blackburn on Sales*,<sup>3</sup> the purchaser pays for an abandonment by the lessor or vendor of the right to injure the freehold. He buys an interest "*concerning land*," and that is covered by the language of the 4th section.

In the early case of *Waddington v. Bristow*,<sup>4</sup> in 1801, an agreement for the purchase of growing hops at 10*l.* per

Crops when mere accessories to the land.

*Earl of Falmouth v. Thomas.*

*Waddington v. Bristow.*

<sup>1</sup> 1 *Crom. & M.* 89.

<sup>3</sup> Page 20.

<sup>2</sup> 3 *B. & C.* 366.

<sup>4</sup> 2 *Bos. & P.* 452.

cwt., to be put in pockets and delivered by seller, was held to require a stamp, and not to come within the exemption of agreements for the sale of goods, wares, and merchandise. This case is quite irreconcilable with the principles settled in the more modern decisions, and in *Rodwell v. Phillips*,<sup>1</sup> Parke, B., said of it: "Hops are *fructus industriales*. That case would now probably be decided differently." It may therefore be considered as overruled.

<sup>1</sup> 9 M. & W. 503.

## CHAPTER III.

### WHAT IS A CONTRACT FOR THE PRICE, OR OF THE VALUE OF 10*l*.

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In several cases, questions have been raised as to the construction of the words, "for the price of 10*l*. and upwards," and "of the value of ten pounds and upwards," as used in the 17th section of the Statute of Frauds, and in Lord Tenterden's Act.

In *Baldey v. Parker*,<sup>1</sup> the plaintiffs were linendrapers, and the defendant came to their shop and bargained for several articles. A separate price was agreed for each, and no one article was of the value of 10*l*. Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. The account as sent amounted to 70*l*., and he demanded a discount of 20*l*. per cent. for ready money, which was refused. The goods were then sent to his house, and he refused to take them. Held, that this was one entire contract within the 17th section. All the judges, Abbott, C.J., Bayley, Holroyd, and Best, JJ., gave separate opinions. Abbott, C. J., said, "Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles." Bayley, J., said, "It is conceded that on the same day, and

Several articles  
sold at same  
time.  
*Baldey v.*  
*Parker.*

<sup>1</sup> 2 B. & C. 37. See *Price v. Lea*, 1 B. & C. 156.

indeed at the same meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than 10*l.* Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than 10*l.* within the 17th section; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law." Holroyd, J., said, "This was all one transaction, though composed of different parts. At first, it appears to have been a contract for goods of less value than 10*l.*, but in the course of the dealing it grew to a contract for a much larger amount. At last, therefore, it was one entire contract within the meaning and mischief of the Statute of Frauds, *it being the intention of that statute, that where the contract, either at the commencement or the conclusion, amounted to or exceeded the value of 10*l.*, it should not bind, unless the requisites there mentioned were complied with.* The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l.*, as if it had been originally of that amount."

Best, J., said, "Whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account."

Auction sales  
of several lots.

But where at an auction, the same person buys several successive lots as they are offered, a distinct contract arises for each lot, and the decision to this effect in *Emmerson v. Heelis*<sup>1</sup> was not questioned in *Baldey v. Parker*.

Uncertain  
value.

Although at the time of the bargain it may be uncertain whether the thing sold will be of the value of 10*l.* according to the terms of the contract, yet if in the result it turn out that the value actually exceeds 10*l.*, the statute applies. This point was involved in the decision in *Watts v. Friend*,<sup>2</sup> where the sale was of a future crop of turnip-seed which

<sup>1</sup> 2 Taunt. 38. Also *per Le Blanc*, *Roots v. Lord Dormer*, 4 B. & Ad. 77. J., in *Rugg v. Minett*, 11 East, 218;      <sup>2</sup> 10 B. & C. 446.

might or might not amount to 10*l.*, the price stipulated being a guinea a bushel. But the point was not argued nor mentioned by counsel or by the court.

Where a contract includes a sale of goods, and other matters not within the statute, if the goods included in the contract be of the value of 10*l.*, the 17th section of the statute will apply. In *Harman v. Reeve*,<sup>1</sup> the plaintiff had sold a mare and foal to defendant, with the obligation to agist them at his own expense till Michaelmas, and also to agist another mare and foal belonging to defendant, the whole for 30*l.* Averment of full performance by plaintiff, and breach by defendant. It was admitted that the mare and foal agreed to be sold were above the value of 10*l.* Held, that the contract for the sale was within the 17th section of the statute. *Semble*, however, that although the contract was entire, and the price indivisible, plaintiff might have recovered the value of the agistment of defendant's mare and foal. *Per* Jervis, C. J., and Williams, J.<sup>2</sup>

Different contracts for one consideration.

*Harman v. Reeve.*

<sup>1</sup> 25 L. J., C. P. 257; 18 C. B. 586. & J. 95; and *Astey v. Emery*, 4 M.

<sup>2</sup> See also *Wood v. Benson*, 2 Cr. & S. 263.

## CHAPTER IV.

### OF ACCEPTANCE AND RECEIPT.

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OF THE CONSTRUCTION OF THE WORDS "EXCEPT THE BUYER SHALL ACCEPT PART OF THE GOODS SO SOLD, AND ACTUALLY RECEIVE THE SAME."

Having considered the meaning of the words "no contract for the sale of any goods, wares, or merchandise for the price of 10*l.* or upwards," so as to ascertain what contracts are within the 17th section, the next step in the investigation is to inquire into the several conditions required by the law before such contracts "shall be allowed to be good." The language is that they shall not be allowed to be good "except—

1. "The buyer shall accept part of the goods so sold, and actually receive the same ;"

2. "Or give something in earnest to bind the bargain, or in part payment;"
3. "Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised."

The first of these exceptions is the subject of the present chapter.

SECTION I.—WHAT IS AN ACCEPTANCE.

In commenting on this clause, Mr. Justice Blackburn makes the following remarks:—<sup>1</sup>

"If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with, unless the two things concur: the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without any acceptance, so may there be an acceptance without any receipt. In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he *ought* to accept, but whether he *has* accepted them. The question of acceptance or not is a question as to what was the intention of the buyer, as signified by his outward acts.

General observations.

"The receipt of part of the goods is the taking posses-

<sup>1</sup> Blackburn on Sales, 22, 23.



sion of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order or not: it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order. It follows from this that a receipt of goods by a carrier, or on board ship, though a sufficient delivery to the purchaser, is not an acceptance by him, so as to bind the contract, for the carrier, if he be an agent to receive, is clearly not one to accept the goods."

Acceptance of  
sample as  
part.

Hinde v. White-  
house.

The decisions upon the question what constitutes an acceptance have been numerous. In a leading case, *Hinde v. Whitehouse*,<sup>1</sup> where sugar had been sold by auction, the defendant, as highest bidder, had received the sample of sugar knocked down to him, and it was proved that at such sales the samples were always delivered to the purchasers as part of their purchase to make up the quantity. This was held to be an acceptance of part of the goods sold, Lord Ellenborough saying, "Inasmuch as the half pound sample of sugar out of each hogshead in this case is, by the terms and conditions of sale, so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting *a part of the bulk actually weighed out to the buyer*; and to be allowed for specifically if he should chuse to have the commodity weighed; I cannot but consider it as *a part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer*. And although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent

<sup>1</sup> 7 East 558.

its operating to another consistent intent, also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, as a part delivery of the thing itself, *as soon as in virtue of the bargain, the buyer should be entitled to retain, and should retain it accordingly.*"

In *Phillips v. Bistolli*,<sup>1</sup> where a purchaser of some jewelry at an auction sale held it in his hands a few minutes and tendered it back to the auctioneer, saying there had been a mistake, the court set aside a verdict for plaintiff, and ordered a new trial, saying, "to satisfy the statute there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, *with an intention of taking to the possession as owner.*"

*Phillips v.  
Bistolli.*

In *Gardner v. Grout*,<sup>2</sup> after the sale agreed on, the buyer went to the vendor's warehouse and got samples of the goods sold, which he promised to pay for when he took away the bulk; and the samples so taken were weighed and entered against him in the vendor's books. The vendor then refused to complete the sale, but *held* that there had been a part acceptance making the bargain complete.

*Gardner v.  
Grout.*

In this case the defendant cited *Simonds v. Fisher*, not reported, in which Wightman, J., had nonsuited the plaintiff, the facts being that plaintiff showed defendant samples of wine which the latter agreed to buy, and after the bargain was concluded, the buyer asked for the samples and wrote on the labels the prices agreed on; and this taking of the samples was relied on as a part acceptance, so as to take the case out of the statute. But the court, in deciding *Gardner v. Grout*, distinguished it from *Simonds v. Fisher*, saying, "There the buyer never saw the bulk: the things handed to him really were mere samples.<sup>3</sup> But here the plaintiff receives part of the very things which he has already bought."

*Simonds v.  
Fisher.*

<sup>1</sup> 2 B. & C. 511. See also *Klinitz v. West, Holt*, 178.

*v. Surrey*, 5 Esp. 266. <sup>2</sup> See also *Cooper v. Elston*, 7 T.

<sup>3</sup> 2 C. B., N. S. 340. See also *R. 14*, where the sample was not *Klinitz v. Surrey*, 5 Esp. 267; *Talver* part of the bulk.

Foster v.  
Frampton.

So in *Foster v. Frampton*,<sup>1</sup> the drawing of samples by a vendee from hogsheads of sugar forwarded to him by the vendor, when the sugar was in the carrier's warehouse at the place of destination, was held to be a taking possession of part of the goods, "a complete act of ownership" (*per* Littledale, J.), putting an end to the vendor's right of stoppage *in transitu*.

Gilliat v. Roberts.

In *Gilliat v. Roberts*,<sup>2</sup> the defendant having purchased 100 quarters of wheat, sent his servant for three sacks of it, which were delivered, but the contract was for wheat "not to weigh less than nine and a half stone neat imperial measure, to be made up eighteen stone neat," and the sacks sent had not been tested according to imperial measure, nor had the wheat received the usual final dressing before delivery. On these facts, the defendant, who had not returned the three sacks, maintained that he had kept them under a new implied contract to pay for their value, and not as part of the 100 bushels bought, with which the three sacks did not correspond in description. But *held* that there was but one contract, and that the buyer had actually received and accepted part of the goods sold, so as to take the case out of the statute.

Acceptance may  
be construc-  
tive.

It is quite well settled that the acceptance of the goods, or part of them, as required by the statute, may be constructive only, and that the question whether the facts proven amount to a constructive acceptance is one "of fact for the jury, not matter of law for the court."<sup>3</sup> The acceptance must be clear and unequivocal, but "it is a question for the jury whether, under all the circumstances, the acts which the buyer does, or forbears to do, amount to an acceptance."<sup>4</sup> All the cases proceed on this principle.

Question of fact,  
not of law.

When buyer  
does an act of  
ownership.

The constructive acceptance by the buyer may properly be inferred by the jury when he deals with the goods as

<sup>1</sup> 6 B. & C. 107.

<sup>2</sup> 19 L. J., Ex. 410.

<sup>3</sup> *Per* Denman, C. J., in *Eden v. Duddfield*, 1 Q. B. 302.

<sup>4</sup> *Per* Coleridge, J., in *Bushel v.*

*Wheeler*, 15 Q. B. 442, quoted and approved by Campbell, C. J., in *Tibbetts v. Morton*, 15 Q. B. 428, and 19 L. J., Q. B. 382. See also *Parker v. Wallis*, 5 E. & B. 21.

owner, when he does an act which he would have authority to do as owner, but not otherwise. In the language of an eminent judge,<sup>1</sup> "if the vendee does any act to the goods, of wrong if he is not owner of the goods, and of right, if he is owner of the goods, the doing of that act is evidence that he has accepted them."

Thus, in *Chaplin v. Rogers*,<sup>2</sup> where the purchaser of a stack of hay resold part of it, and in *Blenkinsop v. Clayton*,<sup>3</sup> where the purchaser of a horse took a third person to the vendor's stable, and offered to resell the horse to the third person at a profit, the buyer was held in both instances to have done an act inconsistent with the continuance of a right of property in his vendor, and to have accepted within the meaning of the statute.

In *Beaumont v. Brengeri*,<sup>4</sup> where the defendant bought a carriage from plaintiff, and ordered certain alterations made, and then sent for the carriage and took a drive in it, after telling plaintiff that he intended to take it out a few times so as to make it pass for a second-hand carriage on exportation, *held*, that the defendant had thereby assumed to deal with it as his own, had accepted it, and could not refuse to take it, although it had been sent back and left in the plaintiff's shop.

But in *Maberley v. Sheppard*,<sup>5</sup> the action was for goods sold *and delivered*, and it was proven that the defendant ordered a wagon to be made for him by plaintiff, and during the progress of the work furnished the iron work and sent it to plaintiff, and sent a man to help plaintiff in fitting the iron to the wagon, and afterwards bought a tilt, and sent it to the plaintiff to be put on the wagon. It was insisted by plaintiff that the defendant had thereby exercised such dominion over the goods sold as amounted to acceptance. The Court took time to consider, and Tindal, C. J., delivered the decision that the plaintiff had been rightly non-

<sup>1</sup> Erle, J., in *Parker v. Wallis*, 5 E. & B. 21.      *white v. Devereux*, 15 M. & W. 285, and *Baines v. Jevons*, 7 C. & P. 288.

<sup>2</sup> 1 East, 195.

<sup>4</sup> 5 C. B. 301.

<sup>3</sup> 7 Taunt. 597. See also *Lilly-*

<sup>5</sup> 10 Bing. 99.

suited, because the acts of the defendant had not been done after the wagon was finished and capable of delivery, but merely while it was in progress; so that it still remained in plaintiff's yard for further work till it was finished. "If the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance."

*Parker v.  
Wallis.*

In *Parker v. Wallis*,<sup>1</sup> the defendants received some turnip-seed under a verbal contract of sale, but sent word at once to plaintiff that it was "out of condition;" this was denied by plaintiff, who refused to receive it back. The defendants then took the seed out of the bags, and laid it out thin, alleging that it was hot and mouldy, and that plaintiff had given them authority to do so; both these facts were denied by plaintiff. Plaintiff was non-suited by Wightman, J., and leave reserved to enter a verdict for 140*l.*, the price of the seed, if the evidence sufficed to show acceptance and actual receipt of any part of the goods. The Court made the rule absolute for a new trial, but refused to enter verdict for plaintiff. Held, that the act of taking the seed out of the bags was susceptible of various constructions. It might have been because the seed was hot, or because the plaintiff had authorised it. But, as the evidence stood, when the non-suit was ordered, these were not the facts. There remained a third construction, namely, that spreading out the seed was an act of ownership, a wrongful act, if the defendants had not accepted as owners. This was a question for the jury.

*Kent v. Hus-  
kisson.*

In *Kent v. Huskisson*,<sup>2</sup> there was an actual receipt, but no acceptance. The buyer gave an order for sponge, at 11*s.* per pound. On arrival of the package it was examined, and judged to be worth not more than 6*s.* per pound. He at once returned it by the same carrier. Held, no acceptance.

*Dealing with  
bill of lading.*

A dealing with goods, so as to justify a jury in finding a

<sup>1</sup> 5 E. & B. 21.

<sup>2</sup> 3 B. & P. 233.

constructive acceptance, may take place as effectively with the bill of lading, which represents the goods, as with the goods themselves.<sup>1</sup>

Very deliberate consideration was given to the whole subject by the Queen's Bench, in the important case of *Morton v. Tibbets*.<sup>2</sup> The facts were, that on the 25th August, defendant made a verbal agreement with plaintiff for the purchase of fifty quarters of wheat according to sample, each quarter to be of a certain specified weight. Defendant, by agreement, sent a general carrier next morning to a place named, and the wheat was then and there received on board of one of the carrier's lighters, for conveyance by canal to Wisbeach, where it arrived on the 28th. In the meantime, on the 26th, the defendant resold the wheat by the same sample, and on the understanding that it was to be of the same weight per quarter as had been agreed with plaintiff, and the wheat upon arrival was examined and weighed by the second purchaser and rejected, because found to be of short weight. Defendant thereupon wrote to plaintiff on the 30th, also rejecting the wheat for short weight. The wheat remained in possession of the carrier, who had received it without its being weighed, and neither defendant, nor any one in his behalf, had seen it weighed. The action was debt for goods sold and delivered, and goods bargained and sold. Verdict for plaintiff, with leave reserved to move for non-suit. The judgment of the Court was unanimous after taking time for consideration, the point for decision being whether the verdict was justified by any evidence that defendant had accepted the goods, and actually received the same, so as to render him liable as buyer.

*Morton v.  
Tibbets.*

Lord Campbell said that it would be very difficult to reconcile the cases on the subject, and that the exact words of the 17th section had not always been kept in recollection. After referring to the language, he added: "The acceptance is to be something which is to precede, or at any

<sup>1</sup> *Currie v. Anderson*, 29 L. J., Q. B. 87, and 2 E. & E. 592; *Meredith*

E. & B. 864.

*v. Meigh*, 22 L. J., Q. B. 401, and 2

<sup>2</sup> 19 L. J., Q. B. 382, and 15 Q. B. 428.

rate to be contemporaneous with, the actual receipt of the goods; and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. As the Act of Parliament expressly makes the acceptance and actual receipt of any *part* of the goods sold sufficient, it must be open to the buyer to object, at all events, to the quantity and quality of the *residue*; and even where the sale is by sample, that the residue offered does not correspond with the sample." His lordship then continued, by announcing that: "We are of opinion that there may be an acceptance and receipt within the meaning of the Act without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The *acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.*"

Distinction between formation and performance of the contract.

The distinction pointed out in this last clause is important, and should not be lost sight of. The question presented to the Court may be, whether there was a contract, or it may be whether the contract was fulfilled. It is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold (as, for instance, the half-pound of sugar, in *Hinde v. Whitehouse*),<sup>1</sup> in order that the contract may "be allowed to be good;" and yet the purchaser may well refuse to accept the delivery of the bulk, not because there is not a valid contract proven, but because the vendor fails to comply with the contract as proven.

The decision of Lord Campbell then closed with declaring: "We are therefore of opinion that although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to the carrier was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it."

There was very plain evidence that the defendant *received*

<sup>1</sup> 7 East, 558.

it, but the only proof of *acceptance* was the fact of the resale before examination. The decision, therefore, goes no farther, it would seem, than to determine that this was such an exercise of dominion over goods bought as is inconsistent with a continuance of the right of property in the vendor, and therefore evidence to justify a jury in finding acceptance, as well as actual receipt by the buyer. Martin, B., in *Hunt v. Hecht*,<sup>1</sup> declared that this was the whole scope of the decision; and again, in *Coombs v. Bristol and Exeter Railway Company*,<sup>2</sup> expressed his dissent from the principles maintained in the opinion pronounced by Lord Campbell. In *Castle v. Swarder*,<sup>3</sup> Cockburn, C. J., said: "It must not be assumed that I assent to the decision in *Morton v. Tibbetts*." Remarks of different judges on *Morton v. Tibbetts*.  
Martin, B.  
Cockburn, C.J.

On the other hand, Blackburn, J., in delivering the opinion of the Court in *Cusack v. Robinson*,<sup>4</sup> on the 25th May, 1861, just ten days after this observation of the Chief Justice in *Castle v. Swarder*, cites *Morton v. Tibbetts* as authority for the proposition—"that the acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act, after the goods have been actually received, weighed, measured, or examined." The Court, on this occasion, was composed of only two judges, Blackburn and Hill, JJ. In the same Court, in February, 1860, Crompton, J., had stated, in the case of *Currie v. Anderson*,<sup>5</sup> that "before the case of *Morton v. Tibbetts*, there was authority for saying that there could have been no acceptance and receipt within the Statute of Frauds until the vendee had been placed in such connexion with the goods that he could not object to them on account of their quantity and quality; and in that case Lord Campbell says, if that is the law, it would be decisive against the plaintiff, but after a careful review of the cases, the Court came to the conclusion (which, in this Court, must be considered to

<sup>1</sup> 8 Exch. 814.<sup>4</sup> 1 B. & S. 299, and 30 L. J., Q.<sup>2</sup> 3 H. & N. 510; 27 L. J., Ex. 401. B. 261.<sup>3</sup> 6 H. & N. 832; 30 L. J., Ex. 310.<sup>5</sup> 2 E. & E. 592; 29 L. J., Q. B. 87.



be the law of the land), that in order to make an acceptance and receipt within the Statute of Frauds, *it is not necessary that the vendee should have done anything to preclude himself from objecting to the goods.* That was the decision in *Morton v. Tibbetts*, and from the discussion to-day, I have more reason than ever to be satisfied with it."

It is fair to assume from the foregoing review, that, notwithstanding the observation of Cockburn, C. J., in *Castle v. Sworder*, the law is considered to be settled in the Court of Queen's Bench in conformity with the decision in *Morton v. Tibbetts*, and that the authority of that case remains unshaken in that Court.

In the Exchequer, however, the leaning of the judges is evidently adverse to the construction placed in the Queen's Bench upon this clause of the statute, though in no case has there been a decided rejection of the authority of *Morton v. Tibbetts*.

*Hunt v. Hecht.*

*Hunt v. Hecht*<sup>1</sup> was decided in 1853, and, therefore, prior to the recent cases in which the judges of the Queen's Bench have shown what is, in the opinion of that Court, the full extent of the decision in *Morton v. Tibbetts*. The facts were, that a number of bags of bone were sent by defendant's order to his wharfinger, in compliance with a verbal contract with plaintiff. The defendant went to plaintiff's warehouse, and there inspected a heap of ox-bones, mixed with others inferior in quality. Defendant objected to the latter, but verbally agreed to purchase a quantity of the others, to be separated from the rest, and ordered them to be sent to his wharfinger. The bags were received on the 9th, and examined next day by the defendant, as soon as he heard of their being sent to the wharf, and he at once refused to accept them. Held, no acceptance. All the judges put the case on the ground of the goods sold having been mixed in bulk with others, so that no acceptance was possible till after separation, and there was no pretence that there had been an acceptance after

<sup>1</sup> 8 Exch. 814; 22 L. J., Ex. 293.

separation, otherwise than by the wharfinger's receipt, which was insufficient for that purpose, but Martin, B., said: "There are various authorities to show that for the purpose of an acceptance within the statute, the vendee must have had the opportunity of exercising his judgment with respect to the article sent. *Morton v. Tibbetts* has been cited as an authority to the contrary, but in reality that case decides no more than this, that where the purchaser of goods takes upon himself to exercise dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same. The Court, indeed, there say that there may be an acceptance and receipt within the statute, although the vendee has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. But in my opinion, an acceptance, to satisfy the statute, must be something more than a mere receipt; *it means some act done, after the vendee has exercised, or had the means of exercising, his right of rejection.*"

In the case of *Coombs v. The Bristol and Exeter Railway Company*,<sup>1</sup> decided in 1858, the same Court had occasion to review the subject, and Pollock, C. B., said that *Hunt v. Hecht* had decided "that the vendee should have an opportunity of rejecting the goods. The statute requires not only delivery, but acceptance." Martin, B., said, "No doubt in *Morton v. Tibbetts* the Court of Queen's Bench carried out the principle of constructive acceptance to an extent which in that case was correct: but I adhere to that which I said in *Hunt v. Hecht*, that much that was there said is doubtful, and that acceptance, to satisfy the statute, must be after the opportunity of exercising an option, or after the doing of some act waiving it." Bramwell, B., said without qualification, "The cases establish that there can be no accept-

*Coombs v. Bristol and Exeter Railway Company.*

<sup>1</sup> 3 H. & N. 510; 27 L. J., Ex. 401.

ance where there has been no opportunity of rejecting." Watson, B., concurred.

Smith v.  
Hudson.

The latest case in which the subject of acceptance under the statute has arisen is *Smith v. Hudson*,<sup>1</sup> decided in the Queen's Bench in Easter Term, 1865. All the cases were reviewed by able counsel, and commented on by the judges in the course of the argument. The plaintiffs were assignees of Willden, a bankrupt. The defendant, on 3rd Nov., 1863, sold to Willden by verbal contract a quantity of barley, according to sample. The bulk was conveyed by the vendor in his own wagons to the railway station, on the 7th November, and he gave orders to convey and deliver it to the purchaser. It was admitted that by the custom of the trade the purchaser, notwithstanding the delivery of the bulk at the station, had the power of rejecting the goods if found not equal to sample. On the 9th November Willden was adjudicated a bankrupt on his own petition, without having given any orders or directions about the barley, which still remained at the railway station, nor had he examined it or given any notice whether he accepted or declined it. Nothing had been paid on account of the price, and on the 11th November the vendor gave notice to the railway company not to deliver the goods to any one but himself. The corn was given up to the vendor by the Company, and the assignees of Willden claimed it as the property of the bankrupt. On the question whether there had been an acceptance under the Statute of Frauds, *held* by all the judges, Cockburn, C. J., Blackburn, Mellor, and Shee, JJ., that the contract could not be allowed to be good. The Chief Justice held *Hunt v. Hecht* to be binding on the Court as an authority, that where the buyer has a right to inspect the articles sold to see whether they are in accordance with the contract, there is no acceptance till he has time to make the inspection. Blackburn, J., said, "There must be both acceptance and receipt to bind both purchaser and vendor under the statute." And in all the opinions it was held

<sup>1</sup> 6 B. & S. 431 ; 34 L. J., Q. B. 145.

that the countermand of the vendor before the goods had been delivered according to his order, and before acceptance, put an end to the contract, and deprived the assignees of the power to accept, on behalf of the bankrupt.

This case is worthy of note, also, on another ground. It clearly recognises and maintains the long-established doctrine that the acceptance and actual receipt are distinct things, both of which are essential to the validity of the contract. This would seem sufficiently clear from the language of the statute, but on more than one recent occasion remarks had been made by eminent judges, suggesting doubt upon the question. Thus, in *Castle v. Sworder*,<sup>1</sup> Crompton, J., said, "I have sometimes doubted whether there is much distinction between receipt and acceptance;" and Cockburn, C. J., said, "I think those terms (*i. e.*, acceptance and receipt) are equivalent." In *Marvin v. Wallace*,<sup>2</sup> also, Erle, J., said, according to one report, "I believe that the party who inserted the words had no idea what he meant by acceptance. That opinion I found on the everlasting discussion which has gone on, as if possession according to law could mean only manual prehension." It is probable, however, both from the context and from the point in dispute, that his lordship is more correctly represented in another report, as saying, "I believe that the persons who framed the statute, and inserted the words 'actually receive the same,' had no clear idea of their meaning," &c. It may confidently be assumed, however, that the construction which attributes distinct meanings to the two expressions, "acceptance" and "actual receipt" is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in *Smith v. Hudson*.

Acceptance by the vendee may be prior to the actual receipt of the goods, as, for instance, when he has inspected and approved the specific goods at or before the time of

Acceptance  
may precede  
receipt.

<sup>1</sup> 6 H. & N. 832; 30 L. J., Ex. 810.

<sup>2</sup> 6 E. & B. 726; 25 L. J., Q. B. 369.

*Cusack v. Robinson.*

purchasing. Thus, in *Cusack v. Robinson*,<sup>1</sup> where the buyer was shown a lot of 156 firkins of butter in the vendor's cellar, and had the opportunity of inspecting as many of them as he pleased, and did in fact open and inspect six of the firkins, and then agreed to buy them, and the goods were then forwarded to the purchaser by a carrier according to his directions; it was held, that there was sufficient evidence to justify the jury in finding an acceptance, and that the acceptance before the bargain was concluded was a compliance with the statute. This question was raised, but not decided, in *Saunders v. Topp*,<sup>2</sup> which is referred to by Blackburn, J., in delivering the opinion of the Court in *Cusack v. Robinson*.

*Nicholson v. Bower.*

In deciding *Cusack v. Robinson*, the Court distinguished it from *Nicholson v. Bower*,<sup>3</sup> because in the latter case there had been no specific goods selected and fixed on in advance. Bower had made a verbal sale of about 140 quarters of wheat, by sample, to be delivered by rail in London. The wheat was received at the London depot, and warehoused by the railway company, and the purchasers sent a carman to get a sample, and after inspecting it, told him not to cart the wheat home at present. The purchasers were really in insolvent circumstances, and immediately after the interview with the carman determined to stop payment, and they therefore thought it would be dishonest to receive the wheat, although equal to sample, when they knew they could not pay for it. All the judges held, that there had been no acceptance in fact, and the assignees of the purchasers were not allowed to retain a verdict in their favour.

*Saunders v. Topp.*

In *Saunders v. Topp*,<sup>2</sup> the defendant had selected forty-five couple of ewes and lambs at the plaintiff's farm, and ordered them to be sent to his own farm, where they were received by his agent. He then ordered them to be sent to another place, where he saw them and counted them over, and said, "it is all right." The Court declined to decide

<sup>1</sup> 1 B. & S. 299; 30 L. J., Q. B. 261.

<sup>2</sup> 4 Ex. 390.

<sup>3</sup> 1 E. & E. 172; 23 L. J., Q. B. 97.

whether the previous selection was equivalent to an acceptance, (a point subsequently decided in the affirmative in *Cusack v. Robinson*, *ut supra*,) but held that the subsequent action of the defendant was sufficient to justify the jury in finding an acceptance after delivery.

In one case,<sup>1</sup> *Maule, J.*, seems to have been strongly of opinion that it was sufficient to prove acceptance of part of the goods by the buyer, *after action brought*, but the Court declined to decide the point without further argument, and the case was settled. All the recent authorities are adverse to this *dictum*, which rested upon the assumption that the fact of acceptance was a mere question of evidence, whereas the statute makes it essential to the validity of the contract in a court of justice. The report of the case shows that the judges had not the language of the statute before them. The point is also ruled adversely to this opinion of *Maule, J.*, in *Bill v. Bament*.<sup>2</sup>

Acceptance  
after action  
brought.

It is settled that the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute an acceptance, these agents having authority only to receive, not to accept, the goods for their employers.<sup>3</sup>

Carrier has no  
authority to  
accept.

Among the numerous cases in which the Courts have set aside verdicts on the ground that the jury had found acceptance by the buyer without sufficient evidence, some may be found which are not readily reconcilable with the principle that a dealing with the article in a manner inconsistent with the continuance of the right of property in the vendor is a constructive acceptance.

*Curtis v. Pugh*  
reviewed.

*Curtis v. Pugh*<sup>4</sup> is an instance of this class. The action was debt, for goods sold and delivered. The purchaser had

<sup>1</sup> *Fricker v. Tomlinson*, 1 Man. & G. 772.

<sup>2</sup> 9 M. & W. 36.

<sup>3</sup> *Astey v. Emery*, 4 M. & S. 262; *Hanson v. Armitage*, 5 B. & Ald. 557; *Johnson v. Dodgson*, 2 M. & W. 656; *Norman v. Phillips*, 14 M. & W. 276; *Hunt v. Hecht*, 8 Ex. 814; *Acebal v. Levy*, 10 Bing. 376; *Meredith v.*

*Meigh*, 2 E. & B. 370, and 22 L. J., Q. B. 401, in which *Hart v. Sattley*, 8 Camp. 528, is over-ruled; *Cusack v. Robinson*, 1 B. & S. 299, and 30 L. J., Q. B. 261; *Hart v. Bush*, E. B. & E. 494, and 27 L. J., Q. B. 271; *Smith v. Hudson*, 6 B. & S. 431, 34 L. J., Q. B. 145.

<sup>4</sup> 10 Q. B. 111.

given a verbal order for three hogsheads of Scotch glue, to be of the description called "Cox's best." The plaintiff, the vendor, sent two hogsheads, all that he was able to deliver at the time, to a wharf in London. Defendant removed them to his own warehouse, and there unpacked the whole of the glue and put it into twenty bags. On examination, the defendant considered the glue inferior to the quality ordered, and so informed plaintiff's agent on the next day. The plaintiff's brother admitted, on inspection two days later, that part of the glue, but not an unusual proportion, was inferior, and offered to make an allowance, but refused to take it back because it had been unpacked and put into bags, which was not necessary for the purpose of examination, and because the glue, when once unpacked, could not be replaced in the same condition in the hogsheads. Lord Denman, C. J., was of opinion that the defendant had not in fact intended to accept the glue, but told the jury that "if the defendant had done any act *altering the condition of the article*, that was an acceptance, and that the question for them was whether or not the act of putting the glue into the bags had altered its condition." The Lord Chief Justice then left it to the jury to say "whether the glue was 'Cox's best,' and whether the defendant *had dealt with it so as to make it his own*," or had done no more than was necessary to examine the quality. All these questions were decided in plaintiff's favour by the jury, but the Court on motion, pursuant to leave reserved, directed a nonsuit, Lord Denman saying, "In what I stated, I certainly carried the doctrine, as to acceptance, a step further than I ought." Patteson, J., said, "My Lord Chief Justice went a step further in his ruling than the authorities warrant," and Coleridge and Wightman, JJ., concurred.

This case appears to be identical in principle with *Parker v. Wallis* (5 E. & B. 21), and the two decisions to be irreconcilable. The jury having found the facts in favour of plaintiff, there was ample evidence of a dealing with the goods which was wrongful unless the buyer was owner, and

the constructive acceptance was therefore complete, according to the more recent decisions.

The cases are not entirely consistent on the point whether mere silence and delay of the purchaser in notifying refusal of goods forwarded by his order suffice to constitute constructive acceptance. The fair deduction from the authorities seems to be that this is a question of degree, that a long and unreasonable delay would afford stringent proof of acceptance, while a shorter time would merely constitute *some* evidence to be taken into consideration with the other circumstances of the case.

Silence and  
delay as proofs  
of acceptance.

In *Bushel v. Wheeler*,<sup>1</sup> in the Court of Queen's Bench, defendant ordered certain machinery to be sent to him at Hereford by the Hereford sloop. It was sent on the 28rd April, and an invoice for the goods at three months' credit was forwarded in a letter of advice to defendant on 25th April. The carrier placed the goods in a warehouse on his own wharf on their arrival at Hereford, and notice was given to defendant. No communication on the subject of the goods was made by defendant till the 7th October, when they were rejected. The defendant proved, however, that after the arrival of the goods at the warehouse, he had seen them, and informed the warehouseman that he did not intend to take them. Erskine, J., directed a verdict for defendant, with leave to move to enter a verdict for plaintiff. The Court refused to enter a verdict for plaintiff, but held that there was evidence of acceptance to go to the jury, and ordered a new trial. Lord Denman said that the "lapse of time, connected with the other circumstances, might show an *acceptance*, and this was a question of fact for the jury." Williams, J., said that there might be a constructive *receipt* as well as delivery; and "it being once established that there may be an *actual receipt* by acquiescence, wherever such a case is set up, it becomes a question for the jury." Coleridge, J., said that the goods were carried by vendee's orders within a reasonable time to a particular warehouse.

*Bushel v.*  
*Wheeler.*

<sup>1</sup> 15 Q. B. 442.



"That comes to the same thing as if they had been ordered to be sent to the vendee's own house, and sent accordingly. In such a case, the vendee would have had the right to look at the goods and return them if they did not correspond to order. But here the vendee took no notice of the arrival, and makes no communication to the party to whom alone a communication was necessary."

Norman v.  
Phillips.

In *Norman v. Phillips*,<sup>1</sup> in the Exchequer, the Court felt bound by *Bushel v. Wheeler*, but declined to apply it to the case before them. Defendant ordered from plaintiff certain yellow deals, with directions to send them to a specified station of the Great Western Railway, to be forwarded to him as on previous occasions. The order was given on 17th April, the deals arrived at the station on the 19th, on which day the defendant was informed of the arrival by the railway clerk, and said he would not take them. An invoice was sent on 27th April, which defendant received and kept, but it did not appear that he had ever seen the deals. On the 28th May, defendant informed plaintiff that he declined to take the goods. Pollock, C.B., refused to nonsuit, and directed the jury to find for plaintiff, with leave reserved to defendant to move for nonsuit or verdict for him. All the judges concurred in making the rule absolute. Alderson, B., remarked during the argument that it was difficult to distinguish the case from *Bushel v. Wheeler*, and it is perceptible, from the language of all the judges, that they did not yield entire assent to that case. *Bushel v. Wheeler* was, however, mentioned as a "well-considered case" in *Morton v. Tibbetts*: and in *Parker v. Wallis*,<sup>2</sup> Lord Campbell said *arguendo*, that "detention of the goods for a long and unreasonable time by the vendee is evidence that he has accepted them." In *Smith v. Hudson* (34 L. J., Q. B. 145), Blackburn, J., refers to *Morton v. Tibbetts* as establishing that lapse of time is *some* evidence of acceptance; and observations to a similar effect are to be found in the opinion delivered by Parke, B., in *Cunliffe v. Harrison*, 6 Ex. 906.

<sup>1</sup> 14 M. & W. 277.

<sup>2</sup> 5 E. & B. 21.

In *Nichols v. Plume*,<sup>1</sup> a quantity of cyder was sent to defendant, who had ordered it verbally, but he refused to receive it, and caused it to be lodged in a warehouse in the neighbourhood not belonging to him. The cyder was not returned to plaintiff, nor did defendant send him any notice of his intention not to use it. Best, C. J., held that there had been no acceptance under the statute. The report does not show the length of the delay which elapsed, nor was the question raised whether there had been constructive acceptance by unreasonable delay.

*Nichols v.  
Plume.*

When goods are marked with the name of the purchaser, by his consent, this constitutes an acceptance of the goods, if all the terms of the contract have been agreed on, but not an actual receipt, and the sale cannot be allowed to be good, without further proof of delivery.<sup>2</sup>

Marking the  
goods.

The acceptance of part of the goods bought makes the contract good for the whole, even in cases where some of the goods are not yet in existence, but are to be manufactured.

Where some of  
the goods not  
yet in existence.

In *Scott v. The Eastern Counties Railway Company*,<sup>3</sup> the defendants ordered a number of lamps from the plaintiff, a manufacturer, of which one, a triangular lamp, was of a very peculiar construction, and was not ready for delivery until nearly two years after the order. In the meantime,

*Scott v. Eastern  
Counties Rail-  
way Company.*

<sup>1</sup> 1 C. & P. 272.

<sup>2</sup> *Bill v. Bament*, 9 M. & W. 36; *Baldey v. Parker*, 2 B. & C. 37; *Proctor v. Jones*, 2 C. & P. 532; *Hodgson v. Le Bret*, 1 Camp. 233; *Boulter v. Arnott*, 1 C. & M. 334; *Anderson v. Scott*, in note to *Hodgson v. Le Bret*, 1 Camp. 235, in which Lord Ellenborough held, that the cutting off the pegs by which the wine in casks was tasted, and the marking of defendant's initials on the cask in his presence, was an incipient *delivery*, sufficient to take the case out of the statute. But this case was disapproved by Best, C. J., in *Proctor v. Jones*, *supra*, and by Alderson, B., in *Saunders v. Topp*,

4 Exch. 390.

In Mr. Chitty's valuable Treatise on Contracts, he cites the foregoing authorities in support of the principle, that "in no case can the marking of goods with the name of the purchaser by his consent, constitute an acceptance within the act, unless it appear from the evidence that the goods have been delivered to the purchaser."—P. 371, 8th Ed. It is submitted, that a thorough examination of the cases will show the true principle to be more accurately stated as given in the text above, than in the foregoing passage in the Treatise on Contracts.

<sup>3</sup> 12 M. & W. 33.

and in the same month when the order was given, all the other lamps were delivered and paid for. The defendants rejected the triangular lamp, and it was objected on action brought that their acceptance of the other lamps two years earlier, and when the triangular lamp was not in existence, could not be considered a part acceptance of that lamp. The Court, however, held the contract entire for all the lamps, and that the acceptance and actual receipt of some of them, made the contract good for all.

Where goods  
are of different  
kinds.  
*Elliott v.*  
*Thomas.*

In *Elliott v. Thomas*,<sup>1</sup> there was a joint order for common steel and for cast steel. The common steel was accepted, but there was a dispute about the cast steel, and the question was, whether the acceptance of the former sufficed to make the whole contract valid, and it was so held. Parke, B., in giving the decision, explained *Thompson v. Maccaroni*,<sup>2</sup> in which the language of the opinion seemed adverse to the view taken by the Court, by showing that this last-named case turned entirely on the form of the action, which was for goods *sold and delivered*, an action clearly not maintainable for such part of the goods as had not been actually delivered to the buyer.

Bargain for sale  
and re-sale.

So where there was a verbal contract of sale, by the terms of which the thing was to be resold to the vendor at a fixed price in a particular event, the acceptance by the purchaser in the first instance takes the whole agreement, as an entire contract, out of the statute, and he cannot object, when afterwards sued on the stipulation for the resale, that this contract was not in writing, and that there had been no acceptance nor actual receipt.<sup>3</sup>

Effect of the  
proof of accept-  
ance and re-  
ceipt.

The effect of the acceptance and actual receipt of the goods, or part of them, is to prove that there was a contract of sale, and this effect is produced, although there may be a dispute between the parties as to the terms of the contract. Such dispute is to be determined on the parol evidence, as all other questions of fact are, by the jury. Where the goods

<sup>1</sup> 3 M. & W. 176.

<sup>2</sup> *Williams v. Burgess*, 10 A. & E.

<sup>3</sup> 3 B. & C. 1. See, also, *Bigg v. Whiskin*, 14 C. B. 195. 409.

have been accepted, litigation may arise on various questions, for instance, as to the price; whether the sale was for cash or on credit; whether notes or acceptances were to be given, &c. This point may not only be inferred from the decisions already referred to, especially that in *Morton v. Tibbetts*, but was expressly decided in *Tomkinson v. Staight*.<sup>1</sup>

The defendant in that case was alleged to have bought a piano from the plaintiff, which was delivered to him at his house, and payment demanded. He said he would not pay, insisting that the agreement was that he should retain the piano as security for some bills of exchange bought from the plaintiffs. The defendant refused to let the plaintiff take back the piano, and kept it. Held, that the acceptance being fully proven, the statute was satisfied, and that the dispute about the terms of the contract thus proven to exist, was matter of fact for decision by the jury on the parol evidence which was properly let in at the trial.

*Tomkinson v. Staight.*

An acceptance by the purchaser can have no effect to satisfy the statute after the vendor has disaffirmed the parol contract. In *Taylor v. Wakefield*,<sup>2</sup> there was a verbal agreement between the owner of goods and his tenant, who had possession of them, that the latter might purchase them at the expiration of his tenancy, but was not to take them till the money was paid. At the termination of the tenancy, the buyer tendered the price, but the vendor refused it, and denied the validity of the bargain. The buyer then proceeded to take away the goods, but the vendor prevented him. *Trover* by the buyer against the vendor. *Held*, no evidence for the jury of acceptance and delivery, because the vendor had disaffirmed the contract before the buyer took to the goods.

Acceptance after disaffirmance of the contract by vendor. *Taylor v. Wakefield.*

<sup>1</sup> 25 L. J., C. P. 85, and 17 C. B. 697.      <sup>2</sup> 6 Ell. & Bl. 765.

## SECTION II.—WHAT IS AN ACTUAL RECEIPT.

This question is not free from difficulty, nor have the cases always been consistent. The circumstances in which the goods happen to be at the time of the contract afford the basis of a convenient arrangement for reviewing the authorities. The goods sold may be in possession—

1. Of the buyer, as bailee or agent of the vendor;
2. Of a third person, also bailee or agent of the vendor;
3. Of the vendor himself, and this is the most usual case.

Goods already  
in possession  
of buyer.

1. When the goods at the time of the contract are already in possession of the purchaser, it may be difficult to prove actual receipt. But wherever it can be shown that the purchaser has done acts inconsistent with the supposition that his former possession has remained unchanged, these acts may be proven by parol, and it is a question of fact for the jury whether the acts were done because the purchaser had taken to the goods as owner. The principle is illustrated in the case of *Edan v. Dudfield*.<sup>1</sup>

*Edan v. Dud-*  
*field.*

In that case the defendant, agent of plaintiff, had in his possession goods which he had entered at the Custom House in his own name, but which belonged to the plaintiff. He agreed to buy them at a discount on the invoice cost, and afterwards sold them. On action for the price it was strenuously maintained by Sir Fitzroy Kelly, that where the goods, exceeding £10 in value, were already in possession of the alleged buyer, there could be no valid sale under the Statute of Frauds, without a writing; because, although there might be a *virtual*, there could not possibly be an *actual* receipt. But the Court, after time to consider, held, that there was evidence to justify the jury in finding an actual receipt, saying, "We have no doubt that one person in possession of another's goods may become the purchaser

<sup>1</sup> 1 Q. B. 306.

of them by parol, and may do subsequent acts, without any writing between the parties, which amount to acceptance (receipt?). And the effect of such acts, necessarily to be proven by parol evidence, must be submitted to a jury."

In *Lillywhite v. Devereux*,<sup>1</sup> the Exchequer Court observed, "No doubt can be entertained after the case of *Edan v. Dudfield*, which was well decided by the Court of Queen's Bench, that this is a question of fact for the jury: and that, if it appears that the conduct of a defendant in dealing with goods already in his possession, is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the Statute of Frauds: as, for instance, if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alter the nature of the property, or the like." In this case, however, the Court disagreed with the jury, and set aside their verdict, as not justified by the evidence.

*Lillywhite v. Devereux.*

2. When the goods, at the time of the sale, are in possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. They were in possession of an agent for the vendor, and therefore, in contemplation of law, in possession of the vendor himself, and they become in the possession of an agent for the purchaser, and therefore in that of the purchaser himself.<sup>2</sup> But it is important to remark that all of the parties must join in this agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent. Therefore, if the seller have goods in possession of a warehouseman, a wharfinger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods or to hold them subject to the control of the buyer, will not effect such a change of posses-

Goods in possession of a third person.

<sup>1</sup> 15 M. & W. 285.

<sup>2</sup> Blackburn on Sale, 28.

sion as amounts to actual receipt, unless the bailee accepts the order or recognises it, or consents to act in accordance with it; and until he has so agreed, he remains agent and bailee of the vendor.

*Bentall v. Burn.*

In *Bentall v. Burn*<sup>1</sup> the King's Bench held that a delivery order given to the purchaser of wine did not amount to an actual acceptance (receipt?) by him, until the warehousemen accepted the order for delivery, "and thereby assented to hold the wine as agents of the vendee." A distinction was suggested in the case, because the warehousemen were the Dock Company, bound by law to transfer goods from buyer to seller when required to do so, but the Court said: "This may be true, and they might render themselves liable to an action for refusing to do so: but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance (receipt?) of them by him until he actually took possession of them."

*Farina v. Home.*

In *Farina v. Home*,<sup>2</sup> the foregoing case was followed by the Exchequer of Pleas. There the wharfinger gave the vendor a delivery warrant making the goods deliverable to him or to his assignee by endorsement on payment of rent and charges. The vendor forthwith endorsed and sent it to the purchaser, who kept it ten months, and refused to pay for the goods or to return the warrant, saying he had sent it to his solicitor and intended to defend the suit, as he had never ordered the goods, adding that they would remain for the present in bond. Held, to be no actual receipt, but sufficient evidence of acceptance to go to the jury.

*Godts v. Rose.*

In *Godts v. Rose*,<sup>3</sup> the vendor had the goods transferred by his warehouseman, on the books of the latter, to the buyer's order, and took the certificate of transfer, which he

<sup>1</sup> 3 B. & C. 423. See, also, *Lackington v. Atherton*, 7 M. & G. 360; *Bill v. Bament*, 9 M. & W. 36; *Lucas v. Dorrien*, 7 Taunt. 278; *Woodley v. Coventry*, 2 H. & C. 164, 32 L. J.,

Ex. 185; *Harman v. Anderson*, 2 Camp. 243.

<sup>2</sup> 16 M. & W. 119.

<sup>3</sup> 17 C. B. 229, and 25 L. J., C. P. 61.

sent by his clerk to the buyer with an invoice for the goods. The clerk handed the invoice and warehouseman's certificate together to the buyer and asked for a cheque for the amount of the invoice, which was refused, the buyer alleging that he was entitled to fourteen days' credit. The clerk then asked for the warehouse certificate back again, but the buyer refused to give it up, and the vendor thereupon countermanded the order on the warehouseman: but the purchaser had already got part of the goods, and the warehouseman thinking that the property had passed, delivered the remainder to the purchaser. The vendor then brought trover against the purchaser, and the Court *held* that the delivery to the purchaser of the warehouseman's certificate was conditional only, and dependent upon his giving a cheque; that the actual receipt therefore had not taken place, the triangular contract not being complete.

But the goods may be lying on the premises of third persons, who are not bailees of them, as timber cut down and lying, at the disposal of the vendor, on the land of the person from whom he bought it, or lying, at his disposal, at a free wharf; and in such cases the delivery may be effected by the vendor's putting the goods at the disposal of the vendee and suffering the latter to take actual control of them, as in the cases of *Tansley v. Turner*<sup>1</sup> and *Cooper v. Bill*,<sup>2</sup> *post*, Book II., Ch. 3.

Goods on premises of third persons not bailees.

3. Usually at the time of the sale the goods are in possession of the vendor himself, and the dealings of men are so infinitely diversified, circumstances vary so much, and the acts of parties so frequently admit of more than one construction, that it is extremely difficult to point out *a priori* at what precise period the goods sold can properly be said in all cases to have been actually received by the vendee. Of course, if the purchaser remove the goods from the vendor's possession and take them into his own, there is an actual receipt. And it is necessary here to renew the observation that the inquiry is now confined to

Goods in possession of vendor.

<sup>1</sup> 2 Bing., N. C. 151.

<sup>2</sup> 34 L. J., Ex. 161; 3 H. & C. 722.



the *validity* not the *performance* of the contract, and that the actual removal by the buyer of a part, however small, of the things sold, if taken as part of the bulk and by virtue of his purchase,<sup>1</sup> is an actual receipt sufficient to make the contract good, although a serious question may and often does arise at a later period, whether there has been an actual receipt of the bulk.

Delivery to common carrier.

It is well settled that the delivery of goods to a common carrier, *à fortiori* to one specially designated by the purchaser, for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. In such cases the carrier is, in contemplation of law, the bailee of the person to whom, not *by* whom, the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose.<sup>2</sup>

It must not be forgotten that the carrier only represents the purchaser for the purpose of *receiving*, not *accepting*, the goods.<sup>3</sup>

Vendor may become bailee of purchaser.

It is also now finally determined, that the goods may remain in the possession of the vendor, *if he assume a changed character*, and yet be actually received by the vendee. It may be agreed that the vendor shall cease to hold as owner, and shall assume the character of bailee or agent of the purchaser, thus converting the possession of the vendor into that of the vendee through his agent.

Chaplin v. Rogers.

The first case was that of *Chaplin v. Rogers*,<sup>4</sup> in 1800, where a stack of hay remaining on the vendor's premises was held to have been actually received by the purchaser, on the ground that he had resold part of it to a sub-vendee, who had taken away the part so purchased by him.

Elmore v. Stone.

But the case usually cited as the leading one on this point is *Elmore v. Stone*,<sup>5</sup> where the purchaser of horses

<sup>1</sup> *Klinitz v. Surry*, 5 Esp. 266.

<sup>2</sup> *Dawes v. Peck*, 8 T. R. 330; *Waite v. Baker*, 2 Ex. 1; *Fragano v. Long*, 4 B. & C. 219; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Johnson v. Dodgson*, 2 M. & W. 653; *Norman v. Phillips*, 14 M. & W. 277; *Meredith v. Meigh*, 2 E. & B. 364, and 22

L. J., Q. B. 401; *Cusack v. Robinson*, 1 B. & S. 299, and 30 L. J., Q. B. 261; *Hart v. Bush*, E. B. & E. 494, and 27 L. J., Q. B. 271; *Smith v. Hudson*, 34 L. J., Q. B. 145; 4 B. & S. 431.

<sup>3</sup> *Supra*, p. 119.

<sup>4</sup> 1 East, 195.

<sup>5</sup> 1 Taunt. 458.

from a dealer, left them with the dealer to be kept at livery for him, the purchaser. Sir James Mansfield delivered the judgment of the Common Bench, holding that as soon as the dealer had consented to keep them at livery his possession was changed, and from that time he held not as owner, but as any other livery-stable keeper might have done.

Nearly half a century later, in 1856, the case of Marvin *Marvin v. Wallis.*<sup>1</sup> on facts almost identical with those in *Elmore v. Stone*, was decided by the Queen's Bench on the authority of the latter. The facts as found by the jury were that after the completion of the bargain, the vendor borrowed the horse for a short time, and, with purchaser's assent, retained him as a borrowed horse. *Held*, that there had been an actual receipt by vendee; that there had been a *change of character* in the vendor, from owner to bailee and agent of the purchaser. The Bench on this occasion was composed of Campbell, C. J., and Coleridge and Erle, JJ.

So in *Beaumont v. Brengeri*,<sup>2</sup> the carriage bought by the defendant remained in the shop of the plaintiff the vendor, but the circumstances showed that this was at the request of the defendant, and that plaintiff had changed his character from owner to warehouseman of the carriage for account of the vendee. *Held*, an actual receipt.

Two cases decided in the King's Bench, in 1820 and 1821, may seem at first sight to trench upon the doctrine established in *Elmore v. Stone* and *Marvin v. Wallis*. In the first, *Tempest v. Fitzgerald*,<sup>3</sup> the purchaser of a horse agreed, in August, to give forty-five guineas for it and to take it away in September. *The parties understood it to be a ready money bargain.* The purchaser returned on the 20th September, ordered the horse out of the stable, mounted and tried it, had it cleaned by his servant, ordered some change in the harness, and asked plaintiff's son to keep it for another week, which was assented to as a favour.

<sup>1</sup> 6 E. & B. 726; 25 L. J., Q. B. 369.

<sup>2</sup> 5 C. B. 301.

<sup>3</sup> 3 B. & A. 680.

Carter v.  
Toussaint.

The purchaser said he would call and pay for the horse about the 26th or 27th. He returned on the 27th with the intention of taking it, but the horse had died in the interval, and he refused to pay. *Held*, that there was no actual receipt. The ground of the decision was that defendant had no right of property in the horse *until the price was paid*; that if he had gone away with the horse vendor might have maintained trover; and the case was distinguished by the judges from Chaplin v. Rogers<sup>1</sup> and Blenkinsop v. Clayton<sup>2</sup> on this basis. In the second case, Carter v. Toussaint,<sup>3</sup> the plaintiffs, who were farriers, sold defendant a racehorse which required firing, and this was done in defendant's presence and with his approbation. It was agreed that the horse should be kept by plaintiffs for twenty days without charge. At the end of that time, by defendant's orders, the horse was taken by plaintiffs to a park to be turned out to grass. It was entered in plaintiffs' name, and this was also done by the direction of defendant, who was anxious that it should not be known that he kept a racehorse. *No time was specified in the bargain for the payment of the price.* *Held*, that there had been no actual receipt, because the seller was not bound to deliver the horse without payment of the price, and that he had never lost possession or control of the horse. If the horse had been put in the park-keeper's books in the name of defendant and by his request, that would have amounted to an actual receipt of it by the purchaser: but on the facts, the purchaser could not have maintained trover against the park-keeper on tendering the keep.

It is apparent, from the reasoning of the judges in both the above cases, that there is nothing irreconcilable between the principles on which they were decided and those which had been sanctioned in the cases previously quoted. Both these cases went distinctly upon the ground that in a cash sale the vendor has a right to demand payment of the price concurrently with delivery of possession; and that as

<sup>1</sup> 1 East, 192.

<sup>2</sup> 7 Taunt. 597.

<sup>3</sup> 5 B. & A. 855.

nothing had been assented to by the vendors which impaired this right, there had been no actual receipt by the vendees.<sup>1</sup>

In *Cusack v. Robinson*,<sup>2</sup> the Court treat the rule as settled that "though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser; the right of lien is gone, and then there is a sufficient receipt to satisfy the statute." *Cusack v. Robinson.*

The subject was very thoroughly discussed in *Castle v. Swarder*,<sup>3</sup> in which an unanimous decision of the Exchequer of Pleas, composed of Martin, Channell, and Bramwell, BB., was reversed by a decision, also unanimous, of the Exchequer Chamber, composed of Cockburn, C. J., and Crompton, J., of the Queen's Bench, and Willes, Byles, and Keating, JJ., of the Common Pleas. *Castle v. Swarder.*

This was an action to recover 80*l.* 2*s.* 2*d.*, the price of some rum and brandy, for which the defendant gave a verbal order, at a price agreed on, *with six months' credit*. The plaintiff's clerk wrote off, and transferred into the defendant's name, in the books kept in plaintiff's bonded warehouse, two specific puncheons of rum and a hogshead of brandy, marked, and described in an invoice sent by post to defendant. These packages the plaintiffs had among their goods in their own bonded cellar, of which they kept one key and the Custom-house officers another. This was the usual mode of selling in bond in Bristol, where plaintiffs were carrying on business as spirit merchants. An invoice, describing the marks of the packages, the ships by which they had been imported, and the contents, was enclosed to defendant in a letter, saying: "The above remain in bond, and which you will find of a very good quality, and hope will merit the continuance of your favours." After the credit had expired, the defendant, when applied to for payment, requested that the goods might continue a further time in bond, and asked

<sup>1</sup> See, also, *Holmes v. Hoskins*, 9 Exch. 753.

<sup>2</sup> 29 L. J., Ex. 235; 30 L. J., Ex.

<sup>3</sup> 30 L. J., Q. B. 264; 1 B. & S. 310, and 6 H. & N. 832.

plaintiffs' traveller to sell the goods for him. He was referred to plaintiffs, and wrote to them, saying: "You will oblige by informing me of the present value of the rum and brandy, that is to say, what you are willing to give for it."

On these facts, Bramwell, B., directed a non-suit, with leave to plaintiff to move, the defendant having objected that there was no delivery nor acceptance to satisfy the Statute of Frauds. Held, by the Court of Exchequer, that there had been no delivery nor actual receipt; that as the goods remained under control of the vendor, and in his possession till after the credit had expired, his lien had revived; and that in the interval while the credit was running, there had been nothing done to constitute actual receipt by the purchaser.

On the appeal to the Exchequer Chamber, Cockburn, C. J., in giving his opinion, said, that "for six months the buyer was entitled to claim the immediate delivery of the specific goods appropriated to him. The question then arises whether the possession which actually remained in the sellers, was a possession in the sellers *by virtue of their original property in the goods*, or *whether it had become a possession as agents and bailees of the buyers*." The learned Chief Justice then went on to point out that there was sufficient evidence of a change of character in the possession to go to the jury, in the facts proven, that is, that the purchaser "dealt with the goods as his own, first, in the request that the sellers would take back the goods, and failing in that request, in asking the plaintiffs to sell the goods for him."

Crompton, J., pointed out that the Court did not differ from the Court of Exchequer save on one point, namely, that "there was some evidence that the character of plaintiffs was changed to that of warehousemen," and said that "according to the authorities there may be such a change of character in the seller as to make him the agent of the buyer, so that the buyer may treat the possession of the seller as his own."

Actual receipt

It will already have been perceived that in many of the

cases, the test for determining whether there has been an actual receipt by the purchaser, has been to inquire whether the vendor has lost his lien.<sup>1</sup> Receipt implies delivery,<sup>2</sup> and it is plain that so long as vendor has not delivered, there can be no actual receipt by vendee. The subject was placed in a very clear light by Holroyd, J., in his decision in *Baldey v. Parker*:<sup>3</sup> "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and, therefore, as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." No exception is known in the whole series of decisions to the propositions here enounced, and it is safe to assume as a general rule, that whenever no fact has been proven showing an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted on in the latest as in the earliest cases. The principal decisions to this effect are referred to in the note.<sup>4</sup>

tested by loss  
of vendor's lien.

It may be useful here to advert to one case in which the circumstances were very peculiar.

In *Dodsley v. Varley*,<sup>5</sup> wool was bought by the defendant from the plaintiff. The price was agreed on, but the wool would have to be weighed. It was sent to the warehouse of a person employed by the defendant, was weighed, and packed up with other wools in sheeting provided by the defendant. It was the usual course for the wool to remain

*Dodsley v.  
Varley.*

<sup>1</sup> See *post*, Book V. Part 1, Ch. 4, on Lien of Vendor.

<sup>2</sup> *Per* Parke, B., in *Saunders v. Topp*, 4 Ex. 394.

<sup>3</sup> 2 B. & C. 37.

<sup>4</sup> *Howe v. Palmer*, 3 B. & A. 321; *Tempest v. Fitzgerald*, 3 B. & A. 680; *Carter v. Toussaint*, 5 B. & A. 855; *Baldey v. Parker*, 2 B. & C. 67; *Smith v. Surman*, 9 B. & C. 561; *Bill v. Bament*, 9 M. & W. 37;

*Phillips v. Bistolli*, 2 B. & C. 511; *Hawes v. Watson*, 2 B. & C. 540; *Maberley v. Sheppard*, 10 Bing. 101; *Holmes v. Hoskins*, 9 Exch. 753; *Cusack v. Robinson*, 30 L. J., Q. B. 264; *Castle v. Swarder*, 29 L. J., Ex. 235; S. C. 30 L. J., Ex. 310, and 6 H. & N. 832; *Morton v. Tibbetts*, 15 Q. B. 428, and 19 L. J., Q. B. 382.

<sup>5</sup> 12 Ad. & E. 632.

at this warehouse till paid for, and this wool had not been paid for. The defendant insisted that the vendor's lien remained, and that the wool therefore had not been actually received by him as purchaser. But the Court held that the property had passed, that the goods had been delivered, and were at the risk of the purchaser. In relation to the vendor's right, the Court said: "The plaintiff had not what is called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment." It is plain that there is nothing in this case which conflicts with the rule, that there can be no actual receipt by purchaser while vendor's lien continues, for the Court held that the lien was gone. It may, however, be remarked, that the effect attributed by the Court to the special agreement, that the goods should remain in the defendant's warehouse without removal till paid for, is much greater than was accorded to a similar stipulation, in the case of

*Howes v. Ball*,<sup>1</sup> where the question was raised in a more direct form than in *Dodsley v. Varley*. In this last-mentioned case, where the litigation was between the vendor and the administrator of the deceased purchaser, the Court held that the property had passed in the thing sold, and that the special stipulation between the parties might, perhaps, amount to a personal licence in favour of the vendor to retake the thing sold, if not paid for at the expiration of the credit allowed; but that such licence could not be available against a transferee of the thing, as a sub-vendee, or the administrator of the vendee.

<sup>1</sup> 7 B. & C. 484.

## CHAPTER V.

### OF EARNEST OR PART PAYMENT.

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THE giving of earnest, however common in ancient times, has fallen so much into disuse, that the two expressions in this clause of the statute, "giving something in earnest" and "giving something in part payment" are often treated as meaning the same thing, although the language clearly intimates that the earnest is "*something*" that "binds the bargain," whereas it is manifest that there can be no part payment till after the bargain has been bound, or closed. Earnest may be money or some gift or token, (among the Romans usually a ring,) given by the buyer to the vendor, and accepted by the latter to mark the final conclusive assent of both sides to the bargain; and this was formerly a prevalent custom in England.<sup>1</sup>

Earnest and part payment distinct.

Examples are found in *Bach v. Owen*,<sup>2</sup> in 1793, and *Goodall v. Skelton*,<sup>3</sup> in 1794, in the former of which a half-penny, and in the latter a shilling, was given in earnest of the bargain.

Whether giving earnest has the effect of passing the property in the thing sold from vendor to vendee will be

<sup>1</sup> Bracton, l. 2, c. 27.

<sup>2</sup> T. R. 409.

<sup>3</sup> 2 H. BL 316.



Either suffices  
to make the  
contract good.

considered in a subsequent part of this treatise,<sup>1</sup> but for the present we are only concerned with the question of its effect in giving validity to a parol contract. The giving of earnest, and the part payment of the price, are two facts independent of the bargain, capable of proof by parol, and the framers of the statute have said in effect that *either* of them, if proven in addition to parol proof of the contract itself, is a sufficient safeguard against fraud and perjury to render the contract good without a writing.

Something must  
be actually  
given to con-  
stitute earnest.

The former of these facts, that of giving something in earnest to "bind the bargain," has been the subject of only one reported case, that of *Blenkinsop v. Clayton*,<sup>2</sup> in which the buyer drew a shilling across the vendor's hand, and which the witness called "striking off the bargain" according to the custom of the country; but as the buyer then returned the coin to his own pocket, instead of giving it to the vendor, the Court necessarily held that the statute had not been satisfied.

*Goodall v.*  
*Skelton.*

There is another case,<sup>3</sup> in which the plaintiff was non-suited in an action on a contract of sale, where a shilling earnest-money was actually given by the buyer to bind the bargain, but the case turned entirely on the form of action, which was for goods *sold and delivered*, under circumstances where the Court was of opinion that there had been no delivery. A count for goods bargained and sold would no doubt have been sustained.

Part payment.

On the subject of part payment, there is but one important decision under this clause of the statute; but the cases which have arisen under analogous clauses in the Statutes of Limitations and the Bankruptcy Acts may be considered with advantage in this connection.

Agreement to  
set off a debt  
due to the  
buyer.

An agreement for the purchase of goods exceeding 10*l.* in value, was made *with* the understanding, and as part of the contract, that the vendor should deduct from the price the amount of a debt previously due by him to the purchaser. The vendor then sent the goods to the purchaser with

<sup>1</sup> *Post*, Book II. ch. 4.

<sup>2</sup> 7 Taunt. 597.

<sup>3</sup> *Goodall v. Skelton*, 2 H. Bl. 316.

an invoice charging him with the price 20*l.* 18*s.* 11*d.*, under which was written, "By your account against me, 4*l.* 14*s.* 11*d.*" The purchaser returned the goods as inferior to sample. It was contended, on behalf of the vendor, who brought an action for goods sold and delivered, that this credit of 4*l.* 14*s.* 11*d.* was a part payment of the price of the goods, sufficient to take the case out of the statute. Held, not to be so. Platt, B., said, "You rely on part of the contract itself, as being part performance of it." Pollock, C. B., said, "Here was nothing but one contract, whereas the statute requires a contract, and if it be not in writing, something besides." Parke, B., said, "Had there been a bargain to sell the leather at a certain price, and *subsequently* an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff, either might have been equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest or in part payment then or subsequently." Alderson, B., said, "The 17th section of the Statute of Frauds implies that to bind a buyer of goods of 10*l.* value without writing he must have done *two* things: first, made a contract; and next, he must have given something as earnest, or in part payment or discharge of his liability. But where one of the terms of an oral bargain is for the seller to take something in part payment, that term cannot alone be equivalent to part payment."<sup>1</sup>

From this case it may be inferred that an agreement to set off a debt due to the buyer would be held to be a part payment, taking the case out of the statute, if made subsequently to the sale, or by an *independent* contract at the time of the sale, such as the giving of a receipt by the

<sup>1</sup> Walker v. Nussey, 16 M. & W. 302.

buyer for the debt previously due to him, but the decision is express on the point that such an agreement, when part of the bargain for the purchase, one of the terms of the contract of sale itself, is not such a part payment as is required to make a parol sale valid for an amount exceeding 10*l*.

Analogous decisions under Statute of Limitations.

Goods "on account" of a debt.

Under the Statute of Limitations, it has been held that where goods are supplied by agreement "on account" of a debt, this is part payment of the debt. The decision to this effect given by the Exchequer in *Hart v. Nash*,<sup>1</sup> was followed by the Queen's Bench in *Hooper v. Stephens*.<sup>2</sup> And the decisions under the Bankruptcy Acts have been to the same effect.<sup>3</sup>

*Blair v. Ormond*.

Board and lodging supplied in part payment.

So, also, in *Blair v. Ormond*,<sup>4</sup> it was held, under the Statute of Limitations, that an agreement by the debtor to board and lodge the creditor at a fixed price per week in deduction of the debt, was a part payment constituting a sufficient acknowledgment of the debt to take it out of the statute.

Bill or note transferred in part payment.

There seems, therefore, no reason to doubt that the part payment required by the Statute of Frauds as an act in addition to the parol contract, in order to make a sale good, need not be made in money, but that any thing of value which by mutual agreement is given by the buyer and accepted by the seller "on account" or in part satisfaction of the price will be equivalent to part payment. The transfer to the vendor of a bill or note "on account" or in part payment, would seem also to suffice to render the bargain valid.<sup>5</sup>

Civil law.

The Roman law on the subject of earnest was very peculiar, and the texts which govern it might readily be misunderstood unless careful discrimination be observed. Earnest was of two kinds: one was an independent contract

<sup>1</sup> 2 Cr. M. & R. 337.

444.

<sup>2</sup> 4 Ad. & El. 71.

<sup>3</sup> *Chamberlyn v. Delarive*, 2 Wils.

<sup>4</sup> *Wilkins v. Casey*, 7 T. R. 713;

253; *Kearslake v. Morgan*, 5 T. R.

*Cannan v. Wood*, 2 M. & W. 465.

513; *Griffiths v. Owen*, 13 M. & W.

<sup>5</sup> 17 Q. B. 423, and 20 L. J., Q. B.

58.

anterior to the agreement of sale; the other was accessory to the contract of sale after it had been agreed on, and was, like the earnest of the common law, a proof that the bargain was concluded, *argumentum contractus facti*.

The independent contract of earnest was an agreement by which a man proposed to another to give him a sum of money for what we should term the option of purchase. If the sale afterwards took place, the earnest money was deducted from the price. If the purchaser declined completing the purchase, he forfeited the earnest money. If the party who had received earnest did not choose to sell when the option was claimed, he was bound to return the earnest money and an equivalent amount by way of forfeiture for disappointing the other in his option.<sup>1</sup>

The other species of earnest of the Roman law was the same as that of the common law. It might consist of a thing, as a ring, *annulus*, which either party, but generally the buyer, gave to the other as a sign, proof, or symbol of the conclusion of the bargain<sup>2</sup>—and when money was given in earnest it was considered as being in part payment of the price.<sup>3</sup> Varro gives this as the etymology of the word;<sup>4</sup> “*Arrhabo sic dicta, ut reliquum reddatur. Hoc verbum à Græco arrabon, reliquum, ex eo quod debitum reliquit* ;”—and the Institutes of Gaius<sup>5</sup> give its true nature, “*Quod sæpe arrhæ nomine pro emptione datur, non eo pertinet quasi sine arrha conventio nihil proficiat; sed ut evidentius probari possit convenisse de pretio*.”

At a later date, however, the Emperor Justinian made by statute an important change in the law of earnest, by providing that in all cases where it was given, whether the sale was in writing or not, and whether there was any stipulation to that effect or not, either party might rescind the sale by forfeiting the amount of the earnest money. The whole text is a remarkable one, giving full rules as to

<sup>1</sup> L. 17, Cod. de Fid. Instr.; Po-thier, Vente, Nos. 497, 8, 9.

<sup>2</sup> Dig. 19, 1, de Act. Emp. et Vend. 11, § 6, Ulp.

<sup>3</sup> Dig. 18, 3, de Lege Commissoria, § Scæv.

<sup>4</sup> De Lingua Latina, lib. 5, § 175.

<sup>5</sup> Com. 3, § 139.

*form of the sale, the assent, the giving of earnest, and the right of rescission.* “*Emptio et venditio contrahitur simul atque de pretio convenerit, quamvis nondum pretium numeratum sit ac ne arrha quidem data fuerit; nam quod arrhæ nomine datur argumentum est emptionis et venditionis contractæ. Sed hæc quidem de emptionibus et venditionibus quæ sine scriptura consistunt obtinere oportet, nam nihil à nobis in hujusmodi venditionibus innovatum est. In his autem quæ scriptura conficiuntur, non aliter perfectam esse venditionem et emptionem constituimus, nisi et instrumenta emptionis fuerint conscripta, vel manu propria contrahentium, vel ab alio quidem scripta, à contrahentibus autem subscripta; et si per tabelliones fiunt, nisi et completiones acceperint et fuerint partibus absoluta. Donec enim aliquid deest ex his, et pœnitentiæ locus est, et potest emptor vel venditor, sine pœna recedere ab emptione. Ita tamen impune eis recedere concedimus, nisi jam arrharum nomine aliquid fuerit datum. Hoc etenim subsecuto, sive in scriptis, sive sine scriptis venditio celebrata est, is qui recusat adimplere contractum, si quidem est emptor, perdit quod dedit: si vero venditor, duplum restituere compellitur, licet super arrhis nihil expressum est.*”<sup>1</sup> This text not only changed the antecedent law, by allowing either party to rescind the bargain by forfeiting the value of the earnest, but it made a further innovation by providing that when the parties had agreed to draw up their sale in writing, either might recede from the bargain until all the forms of a written contract had been finally completed; in derogation of the ante-Justinian law, which made the contract perfect by mutual assent before the writings were drawn up.<sup>2</sup>

Pothier.

Pothier struggles on the authority of Vinnius, to escape from the apparently plain meaning of this text of the Institutes, and maintains the old distinction, that after earnest given to bind the bargain, neither party can escape from his obligations as vendor or purchaser, by the sacrifice of the amount of the earnest.<sup>3</sup> But his reasoning is scarcely satis-

<sup>1</sup> Inst. lib. iii. tit. xxiii. 1.

§ 1, Paul; Gaius, Comm. 3, § 139.

<sup>2</sup> Dig. 18, 1, de Contrah. Empt. 2,

<sup>3</sup> Pothier, Vente, No. 508.

factory, and later authors consider the language of the text too absolute to be explained away.<sup>1</sup>

The French civil code seems to reject Pothier's doctrine, French Code. and provides, art. 1590, "Si la promesse de vente a été faite avec des arrhes, chacun des contractants est maitre de s'en départir, celui qui les a données en les perdant, et celui qui les a reçues en restituant le double." Singularly enough, however, the same discussion has sprung up under this text as under that of Justinian, and the commentators are divided, Toullier, Maleville, Duranton, and some others taking the side of Pothier, while Duvergier, Coulon, Devilleneuve, and Ortolan, are of the contrary opinion.<sup>2</sup>

<sup>1</sup> Ortolan, *Explication Hist. des Inst.* vol. 3, p. 269.

<sup>2</sup> The references are given in Sirey & Gilbert, *Code Annoté*, art. 1590.

## CHAPTER VI.

### OF THE MEMORANDUM OR NOTE IN WRITING.

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THIS clause of the statute is as follows: "Except that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto duly authorised."

For an accurate notion of the true extent and bearing of this clause, it is indispensable to keep constantly in view the leading principles of the law of evidence relating to written contracts. The framers of the statute have in no way interfered with these principles. They have simply said that if the parties to be charged have signed some written note or memorandum of the contract, it shall be allowed to be good. What the legal effect of such a note or memorandum is to be in all other respects, is left entirely as it was at common law.

Law of evidence  
as to written  
contracts not  
changed by the  
statute.

Now at common law, parties entering into any contract, may either reduce its terms to writing, or may refer to some other writing already in existence, as containing the terms of their agreement, and when they do so, they are bound by what is written, whether signed by them or not; and they are not allowed to say that there was a mistake in the writing, and that they intended to agree to something different from its contents, for the very object of putting the agreement in writing, is to prevent disputes about what they intended. This rule of law is very inflexible. If, by the agreement, the whole contract is reduced to writing, or by mutual assent is to be taken as embraced in a pre-existing writing, neither party is allowed to offer proof that any additional terms were agreed to, although, of course, whenever a duty or obligation of any sort results by virtue of the law, or of local customs, or the usages of particular trades, from the written stipulations, such duty or obligation may be enforced, as though it were expressly included among the written terms.

Common law  
principles.

But the common law does not prohibit parties from making contracts of which only part is in writing. A man may agree to build a carriage for another, and the description of the vehicle may be put in writing, and the price may be agreed on by parol, or *vice versa*, or the parties may say in substance, "we agree to what is contained in such a writing, with such additions and exceptions as we now agree upon by word of mouth," and there is no legal objection to this. Parol evidence may be used to show what were the



additions and exceptions, and the writing is conclusive as to the rest.

When either a part, or the whole of an agreement, is thus made in writing, or by reference to a writing, the agreement in general cannot be proven by any other means than by adducing the writing itself in proof, so that independently of the statute, the writing is an indispensable part of the case of him who seeks to prove the agreement. But this result only takes place when the writing is by the consent of both parties agreed to be that which settles and contains their contract in whole or in part. The case is different, if one of the parties chooses to write down for himself, without the concurrence and assent of the other, or if a bystander, without the authority of both, should write out what they said. The writing of the bystander is not evidence at all in such a case, though he may use it to refresh his memory, if called as a witness; but if one of the parties had employed him to make the writing, or had admitted its accuracy, it would be receivable in evidence against him as an admission, and the same would be the case as to what one party had written down for himself. But such writing, not binding on both, would not be indispensable for legal proof of the contract, nor, although of great weight, would it be conclusive upon him against whom it is evidence, as being his admission.

The Statute of Frauds leaves all this law quite as it was before. If the contract be in writing, in whole or in part, it must be proven as containing the only legal evidence of the terms of the agreement, even though not signed or not sufficient under the statute to make the contract good, and though there be sufficient evidence of part payment or of part acceptance and receipt to establish the validity of the contract. The writing in such a case is as indispensable in contracts for the sale of goods of less value than 10*l.*, as in those above that limit, and is as conclusive in settling what the terms of the bargain are as if the Statute of Frauds had never been passed. And where a party has signed a paper which is not a writing agreed upon between

the two, as containing the terms of their agreement, his adversary may use the paper, if he please, as an admission made in his favour, but he is not bound to offer it, any more than he would be bound to prove a verbal admission of his adversary, nor is the effect of a written any greater than that of a verbal admission. In a word, it is always necessary to distinguish whether the writing is the contract of both parties, or the admission of *one*.<sup>1</sup>

It is of course quite beyond the scope of the present treatise to enter with any minuteness into the law of evidence, but the examination of this clause of the statute would be very incomplete without some reference to the decisions which determine in what cases, for what purposes, and to what extent, parol evidence is admissible to affect the rights of the parties, when there exists a note or memorandum in writing of the bargain sufficient to satisfy the 17th section.

Parol evidence, when admissible where there is a written note of the bargain.

It must be steadily borne in mind that the statute was not enacted for cases where the parties, either in person or by agents, have signed a written contract; for in those cases the common law affords by its rules quite as efficient a guarantee against frauds and perjuries as is provided by the statute. The intent of the statute was to prevent the enforcement of *parol* contracts above a certain value, unless the defendant could be shown to have executed the alleged contract by partial performance, as manifested by part payment, or part acceptance, or unless his signature to *some* written *note* or *memorandum* of the bargain—not to the bargain itself—could be shown.<sup>2</sup> The existence of the note or memorandum pre-supposes an antecedent contract by parol, of which the writing is a note or memorandum.

True theory of this clause of the statute.

It is a very simple deduction from this theory of the Parol evidence

<sup>1</sup> The foregoing preliminary remarks are chiefly extracted from the very valuable treatise of Blackburn, J.

<sup>2</sup> See the remarks of Erle, J., in *Sievwright v. Archibald*, 17 Q. B. 124; 20 L. J., Q. B. 529; of Williams,

J., in *Bailey v. Sweeting*, 9 C. B., N. S. 848; 30 L. J., C. P. 150; and of Lord Wensleydale in *Ridgway v. Wharton*, 6 H. of L. 305. The statement in the text is to be found *passim* in the cases on this subject.

is admissible to show that the writing is not a note of the whole bargain.

statute, that parol evidence is admissible for the purpose of showing that the written paper is *not* a note or memorandum of the antecedent parol agreement, but only of part of it, and the decisions are quite in accordance with this view.

Thus, if the writing offered in evidence contains no reference to the price at which the goods were sold, parol evidence is admissible to prove that a price was actually fixed, and the writing is thus shown not to be a note of the agreement, but only of some of its terms.<sup>1</sup>

So where a sale of wool was made by sample, and one of the terms of the bargain was that the wool should be in good dry condition, parol evidence was admitted to show this fact, and thus to invalidate the sold note signed by the broker, which omitted that stipulation.<sup>2</sup>

Inadmissible to supplement an imperfect note.

And the same principle which permits the defendant to offer parol evidence, showing that the written note is imperfect, and therefore *not* such a note as satisfies the statute, forbids him who sets up the writing for the purpose of binding the other, from supplementing the writing by parol proof of terms or stipulations not contained in it; for it is manifest, that by offering such proof, he admits that the writing does not contain a note of the bargain, but only of part of it.<sup>3</sup>

Inadmissible to connect separate written papers.

It is also on this principle that when the bargain is to be made out by separate written papers, parol evidence is not allowed to connect them, but they must either be physically attached together, so as to show that they constitute but one instrument, or they must be connected by reference in the contents of one to the contents of the other,<sup>4</sup> as will be fully seen, *infra* (p. 154).

But where a purchaser agreed to pay by a check on his brother, the Court held that this was not one of the terms which need appear in the writing; and further, that parol

<sup>1</sup> *Elmore v. Kingscote*, 5 B. & C. 142; *Fitzmaurice v. Bayley*, 9 H. of 583; *Goodman v. Griffiths*, 1 H. & L. 78; *Holmes v. Mitchell*, 7 C. B., N. 574; S. C., 26 L. J. Ex. 145; N. S. 361, and 28 L. J. C. P. 201.

*Acebal v. Levy*, 10 Bing. 376.

<sup>2</sup> *Pitts v. Beckett*, 13 M. & W. 743.

<sup>3</sup> *Boydell v. Drummond*, 11 East,

<sup>4</sup> *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Scofield*, 2 B. & C. 945.

proof that under the contract certain candlesticks were to be made with a gallery to receive a shade, did not affect the sufficiency of the writing which described them as "candlesticks complete."<sup>1</sup>

Although parol evidence is not admissible to supply omissions or introduce terms, or to contradict, alter, or vary a written instrument, it is admissible for the purpose of identifying the subject-matter to which the writing refers.<sup>2</sup> Thus, where the written letter contained an agreement to purchase "your wool," parol evidence was admitted to apply the letter, and to show what was meant by "your wool."<sup>3</sup>

Admissible to identify the subject-matter.

Parol evidence is also admitted to show the situation of the parties at the time the writing was made, and the circumstances;<sup>4</sup> to explain the language, as for instance, to show that the bought and sold note have the same meaning among merchants, though the language seems to vary;<sup>5</sup> and to show the date when the bargain was made.<sup>6</sup>

Also to show situation of parties.

Parol evidence was likewise admitted to show that a sale of "fourteen pockets of Kent hops, at 100s.," meant 100s. per cwt., according to the usage of the hop trade.<sup>7</sup>

Also the meaning of words according to trade usage.

Parol evidence is also admissible to show that a written document, purporting to be an agreement, and signed by the parties, was executed, not with the intention of making a present contract, but like an escrow, or writing to take effect only on condition of the happening of a future event.<sup>8</sup>

Also to show that writing was only to take effect conditionally.

Parol evidence is also admissible to explain a latent ambiguity in a contract of sale, as where a bargain was made for the sale of cotton, "to arrive ex 'Peerless' from Bombay," parol evidence was held admissible to show that

To explain latent ambiguity.

<sup>1</sup> *Sarl v. Bourdillon*, 26 L. J., C. P. 78; 1 C. B., N. S. 188.

<sup>2</sup> *Bateman v. Phillips*, 15 East, 472; *Shortrede v. Cheek*, 1 Ad. & El. 57; *Mumford v. Gething*, 7 C. B., N. S. 305, and 29 L. J., C. P. 105.

<sup>3</sup> *Macdonald v. Longbottom*, 28 L. J., Q. B. 293; S. C. on appeal, 1 E. & E. 977, and 29 L. J., Q. B. 256.

<sup>4</sup> *Per Tindal, C. J.*, in *Sweet v. Lee*, 3 M. & G. 466.

<sup>5</sup> *Bold v. Rayner*, 1 M. & W. 342; and *per Erle, C. J.*, in *Siewwright v. Archibald*, 17 Q. B. 124; 20 L. J., Q. B. 529.

<sup>6</sup> *Edmunds v. Downs*, 2 C. & M. 459; *Hartley v. Wharton*, 11 Ad. & E. 934; *Lobb v. Stanley*, 5 Q. B. 574.

<sup>7</sup> *Spicer v. Cooper*, 1 Q. B. 424.

<sup>8</sup> *Pym v. Campbell*, 6 E. & B. 370; 25 L. J., Q. B. 277; *Furness v. Meek*, 27 L. J., Exch. 34.

there were two ships "Peerless" from Bombay, and that the ship "Peerless" intended by the vendor was a different ship "Peerless" from that intended by the buyer, so as to establish a mistake defeating the contract for want of a *consensus ad idem*.<sup>1</sup>

As to particular commercial usages.

The admissibility of parol evidence of particular *commercial usages* to engraft terms into the bargain, or even to introduce conditions apparently at variance with the implication resulting from the written stipulations (as was done in *Field v. Lelean*,<sup>2</sup> where evidence was admitted of a usage in the sale of mining shares, not to make delivery before payment, although the written terms were for a price payable *in futuro*), is too large a branch of the subject to be here treated in detail, and the reader must be referred to the decisions which are collected and classed in the notes to *Wigglesworth v. Dallison*, in the first volume of Smith's *Leading Cases*.<sup>3</sup>

Parol evidence as to subsequent agreement to alter or annul the written note.

After a contract has been proven by the production of a written note or memorandum sufficient to satisfy the statute, the question often arises as to the admissibility of parol proof of a subsequent agreement to change or annul it.

At common law it is competent to the parties at any time after an agreement (not under seal) has been reduced to writing and signed, to make a fresh parol agreement, either to waive the written bargain altogether, to dissolve and annul it, or to subtract from, vary, or qualify its terms, and thus to make a new contract, to be proven partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what is left of the written agreement.<sup>4</sup>

But this principle of the common law is not applicable to a contract for the sale of goods under the Statute of Frauds. No verbal agreement to abandon it in part, or to add to, or omit, or modify any of its terms, is admissible.

Thus parol evidence is not admissible to change the place

<sup>1</sup> *Raffles v. Wichelhaus*, 2 H. & C. 906; 33 L. J., Ex. 160.

<sup>2</sup> Vol. I., p. 546, et seq.

<sup>3</sup> 6 H. & N. 617; 30 L. J., Ex. 168.

<sup>4</sup> *Per Denman, C. J.*, in *Goss v. Lord Nugent*, 5 B. & Ad. 65.

of delivery fixed in the writing,<sup>1</sup> nor the time for the delivery;<sup>2</sup> nor to prove a partial waiver of a promise to furnish a good title;<sup>3</sup> nor a modification of a stipulation for a valuation;<sup>4</sup> nor a change in any of the terms; for the courts can draw no distinction between stipulations that are material and those that are not.<sup>5</sup>

But where there was an executory contract for the building of a landaulet described in the agreement, parol evidence was admitted of alterations and additions ordered by the purchaser from time to time, Gaselee, J., saying that "otherwise every building contract would be avoided by every addition."<sup>6</sup>

Alterations ordered by buyer in chattel manufactured for him.

In *Brady v. Oastler*,<sup>7</sup> the action was for damages for breach of contract in not delivering certain goods within the time fixed by a written contract, and the plaintiff offered parol evidence to prove, as an element of consideration for the jury in estimating damages, that the price fixed in the contract was above the market price, and that he had assented to pay this extra price because of the short term allowed for delivery; but the evidence was rejected by Bramwell, B., at Nisi Prius, and his ruling was approved by Pollock, C. B., and Channell, B.; a strong dissenting opinion, however, was delivered by Martin, B.

*Brady v. Oastler.*

Whether or not parol evidence is admissible to show a subsequent agreement for a waiver and abandonment of the whole contract, proven by a written note or memorandum under the statute, has not been decided, and the *dicta* on the subject are uncertain and contradictory.<sup>8</sup> Where, how-

Parol evidence to show abandonment of contract.

<sup>1</sup> *Moore v. Campbell*, 10 Ex. 323, and 23 L. J., Ex. 310; *Stowell v. Robinson*, 3 Bing. N. C. 928; *Marshall v. Lynn*, 6 M. & W. 109; *Stead v. Dawber*, 10 Ad. & E. 57.

<sup>2</sup> *Noble v. Ward*, L. R. 1, Ex. 117; 35 L. J., Ex. 81.

<sup>3</sup> *Goss v. Lord Nugent*, 5 B. & Ad. 65.

<sup>4</sup> *Harvey v. Grabham*, 5 Ad. & E. 61.

<sup>5</sup> *Per Parke, B.*, in *Marshall v. Lynn*, 6 M. & W. 116. See, also,

*Emmett v. Dewhirst*, 21 L. J., Ch. 497. The cases in the notes to this paragraph overrule *Cuff v. Penn*, 1 M. & S. 21; *Warren v. Stagg*, cited in *Little v. Holland*, 3 T. R. 591, and *Thresh v. Rake*, 1 Esp. 53.

<sup>6</sup> *Hoadly v. McLain*, 10 Bing. 489.

<sup>7</sup> 3 H. & C. 112; 33 L. J., Ex. 300.

<sup>8</sup> *Dicta* of Lord Denman in *Goss v. Lord Nugent*, 5 B. & Ad. 65, and in *Harvey v. Grabham*, 5 Ad. & E. 61; of Sir Wm. Grant in *Price v.*

ever, the agreement to rescind the first contract forms part of or results from a new parol agreement which itself is invalid, and cannot be enforced under the statute, it is held that the new parol agreement cannot have the effect of rescinding the first bargain.<sup>1</sup>

Where note is signed by agent in his own name.

Parol evidence may be offered to show that a signature to a note or memorandum, though made by A. in his own name, was really made in behalf of B., his principal, when the action is brought for the purpose of charging B;<sup>2</sup> but it is not admissible in behalf of A. in such a contract, for the purpose of showing that he is not personally bound, and had acted only as agent of B.<sup>3</sup> Where the paper was signed "D. M. & Co., Brokers," and purported to be a purchase by them for "our principals," not naming the principals, parol evidence was held admissible, of a usage in such cases, that the brokers became personally liable.<sup>4</sup> And in *Wake v. Harrop*<sup>5</sup> (not under Stat. of Frauds), it was held, that parol evidence was admissible to show that by *mistake* the written contract described the agent as principal, contrary to express agreement between the parties.

We may now proceed to the examination of this clause of the statute, dividing the inquiry into two sections:—

1. What is a note or memorandum in writing?
2. When is it a sufficient note of the bargain made?

#### SECTION I.—WHAT IS A NOTE OR MEMORANDUM IN WRITING?

Must be made before action brought.

It may be premised that the note or memorandum must be one made and signed before the action brought. To

*Dyer*, 17 Ves. 356; and of Lord Hardwicke in *Bell v. Howard*, 9 Mod. 305.

<sup>1</sup> *Moore v. Campbell*, 10 Ex. 323, and 23 L. J., Ex. 310; *Noble v. Ward*, L. R. 1, Ex. 117; 35 L. J., Ex. 81.

<sup>2</sup> *Trueman v. Loder*, 11 Ad. & E. 589.

<sup>3</sup> *Higgins v. Senior*, 8 M. & W. 834;

*Cropper v. Cook*, L. R., 3 C. P. 194.

<sup>4</sup> *Humfrey v. Dale*, 7 E. & B. 266, and 26 L. J., Q. B. 137. And see 2 Smith's L. C., 6th Ed., p. 349, for the authorities on this subject.

<sup>5</sup> 6 H. & N. 768; 1 H. & C. 202; 30 L. J., Ex. 273; 31 L. J., Ex. 451.

satisfy the statute, there must be a *good contract* in existence at the time of action brought.<sup>1</sup>

But the statute does not require that the whole of the terms of the contract should be agreed to at one time, nor that they should be written down at one time, nor on one piece of paper; and accordingly it is settled, that where the memorandum of the bargain between the parties is contained in separate pieces of paper, and where these papers contain the *whole* bargain, they form together such a memorandum as will satisfy the statute, provided the contents of the *signed* paper make such reference to the other written paper or papers, as to enable the Court to construe the whole of them together as constituting all the terms of the bargain. And the same result will follow if the other papers were attached or fastened to the signed paper *at the time of the signature*. But if it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the absence of any internal evidence in the contents of the signed paper to show a reference to, or connection with, the unsigned papers, then the several papers taken together do not constitute a memorandum *in writing* of the bargain so as to satisfy the statute.

Need not be written at one time nor on one piece of paper.

Separate papers cannot be connected by parol.

Further, in order to satisfy the statute, when the memorandum relied on consists of separate papers, which it is attempted to connect by showing from their contents that they refer to the same agreement, these separate papers must be consistent and not contradictory in their statement of the terms, for otherwise it would be impossible to determine what the bargain was, without the introduction of parol testimony to show which of the papers stated it correctly.

Separate papers must be consistent.

The authorities are believed to be quite consistent in maintaining these principles. In citing them, it will be observed, that some of the cases were under the 4th section of the statute, the language of which is, on this subject,

4th and 17th sections compared.

<sup>1</sup> *Bill v. Bament*, 9 M. & W. 36. *v. Holland*, L. R. 1, C. P. 1; 35 L. J., See remarks of Willes, J., in *Gibson* C. P. 5.



almost identical with that of the 17th. The two clauses are here placed in juxta-position for comparison.

*Fourth section.*—"Unless the *agreement* on which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the *party* to be charged therewith, or some other person thereunto by him lawfully authorised."

*Seventeenth section.*—"Except that some note or memorandum in writing of the said *bargain* be made, and signed by the *parties* to be charged with such contract, or their agents thereunto lawfully authorised."

It will be noticed hereafter that the question, whether there is any distinction in meaning between the respective words quoted in italics, viz., "*agreement*" and "*bargain*," on the one hand, and "*party*" and "*parties*," on the other hand, has been mooted on several occasions.

Cases reviewed.

The leading case in which it was held that the intention of the signer to connect two written papers, not physically joined, and not containing internal evidence of his purpose to connect them, could not be proven by parol, occurred early in the present century.

Hinde v. Whitehouse.

Hinde v. Whitehouse,<sup>1</sup> in 1806, was the case of a sale by auction. The auctioneer, who, as will be shown hereafter (*post*, Ch. VIII.), is by law an agent authorised to sign for both parties, had a catalogue, headed "To be sold by auction, for particulars apply to Thomas Hinde," and wrote down opposite to the several lots on the catalogue the name of the purchaser. The auctioneer also had a separate paper containing the terms and conditions of the sale, which he read, and placed on his desk. The catalogue contained no reference to the conditions. Held, that the signature to the catalogue was not sufficient to satisfy the statute, on the ground that it did not contain the terms of the bargain, nor refer to the other writing containing those terms.

Kenworthy v. Schofield.

Kenworthy v. Schofield,<sup>2</sup> in the King's Bench in 1824, was decided in the same way, on circumstances precisely

<sup>1</sup> 7 East, 558.

<sup>2</sup> 2 B. & C. 945.

the same. Lord Westbury recently stated the general principle, in a case which arose under a similar clause in the Railway and Canal Traffic Act, in these words, "In order to embody in the letter any other document or memorandum, or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing, that by force of the reference, the writing itself becomes part of the instrument it refers to."<sup>1</sup> [Which refers to it?]

*Peck v. North Staff. Railway Company.*

The first reported case decided in banc, in which a signed paper referring to another writing was deemed sufficient to satisfy the statute, was that of *Saunderson v. Jackson*,<sup>2</sup> in 1800; but the case does not state how this connection between the two papers was made apparent, and can, therefore, give little aid in construing the clause of the statute, although it has been constantly quoted as authority for the general proposition, that the memorandum may be made up of different pieces of paper.

*Saunderson v. Jackson.*

In *Allen v. Bennett*,<sup>3</sup> decided in 1810, the agent of the defendant sold rice to the plaintiff, and entered all the terms of the bargain on the plaintiff's book, but did not mention the plaintiff's name. Subsequently, the defendant wrote to his agent, mentioning the plaintiff's name, and authorising his agent to give credit according to the memorandum in the plaintiff's book, saying, also, that to prevent dispute he sent a "sample of the rice." *Held*, that the letter referred to the memorandum of the bargain sufficiently to render the two together a signed note of the bargain.

*Allen v. Bennett.*

In 1812 *Cooper v. Smith*<sup>4</sup> was distinguished from the foregoing case, because the letter offered to prove the contract, as entered on the plaintiff's books, falsified instead of confirming the entry, by stating that the bargain was for delivery within a specified time, a fact denied by the plaintiff. Le Blanc, J., tersely said, "The letter of the

*Cooper v. Smith.*

<sup>1</sup> *Peck v. North Staffordshire Railway Company*, 10 H. of L. 472—569.

<sup>2</sup> 3 Taunt. 169.

<sup>3</sup> 15 East, 103.

<sup>4</sup> 2 B. & P. 238.

defendant referred to a different contract from that proved on the part of the plaintiff, which puts him out of court, instead of being a recognition of the same contract, as in a former case."

Jackson v.  
Lowe.

In *Jackson v. Lowe and Lynam*,<sup>1</sup> the Common Pleas, in 1822, held it perfectly clear that a contract for the sale of flour was fully proven within the statute by two letters, the first from the plaintiff to the defendants, reciting the contract, and complaining of the defendants' default in not delivering flour of proper quality, and the second from the defendants' attorney in reply to it, saying that the defendants had "performed their contract as far as it has gone, and are ready to complete the remainder," and threatening action if "the flour" was not paid for within a month.

Richards v.  
Porter.

*Richards v. Porter*<sup>2</sup> was decided in the King's Bench in 1827, and on the face of the report it is almost impossible to reconcile it with the other decisions on this point. The facts were, that the plaintiff sent to the defendant, by order of the latter, from Worcester to Derby, on the 25th January, 1826, five pockets of hops, which were delivered to the carriers on that day, and an invoice was forwarded containing the names of the plaintiff as buyer and of the defendant as seller. The defendant was also informed that the hops had been forwarded by the carriers.

A month later, on 27th February, the defendant wrote to the plaintiff: "The hops (five pockets) which I bought of Mr. Richards on the 23rd of last month are not yet arrived, nor have I ever heard of them. *I received the invoice.* The last was much longer than they ought to have been on the road. However, if they do not arrive in a few days, I must get some elsewhere, and consequently cannot accept them." The plaintiff was nonsuited, and the King's Bench held the nonsuit right, Lord Tenterden saying: "I think this letter is not a sufficient note or memorandum in writing of the contract to satisfy the Statute of Frauds.

<sup>1</sup> 1 Bing. 9.

<sup>2</sup> 6 B. & C. 437.

Even connecting it with the invoice, it is imperfect. If we were to decide that this was a sufficient note in writing, we should in effect hold that if a man were to write and say, 'I have received your invoice, but I insist upon it the hops have not been sent in time,' that would be a memorandum in writing of the contract sufficient to satisfy the statute." The facts as reported certainly are not the same as those used in illustration by Lord Tenterden. No doubt, if the defendant had said, "Our bargain was that you should *send* the hops in time, and you delayed beyond the time agreed on," there would have been no proof of the contract in writing as alleged by the plaintiff. But the report shows that the goods were delivered in due time to the carrier, which, in contemplation of law, was a delivery to the purchaser, and the complaint was not that the goods had not been *sent* in time, but that they did not *arrive* in time; that a previous purchase also was delayed "on the road." The dispute, therefore, does not seem to have turned in the least on the *terms* of the bargain, which were completely proven by the letter and invoice together, but on the *execution* of it. In the recent case of *Wilkinson v. Evans*,<sup>1</sup> the judgment in *Richards v. Porter* is said to be reconcilable with the current of decisions by Erle, C. J., on the ground "that the letter stated that the contract contained a term, not stated in the invoice; that the term was that the goods should be delivered within a given time." It is difficult to find in the letter, as quoted in the report, the statement said by the learned Chief Justice to be contained in it. The decision in *Richards v. Porter* seems to be reconcilable with settled principles only on the assumption that there was some proof in the case that the carrier was by special agreement the agent of the vendor, not of the vendee.<sup>2</sup>

The case of *Smith v. Surman*<sup>3</sup> followed in the King's *Smith v. Surman.*

<sup>1</sup> L. R. 1, C. P. 407; 35 L. J., C. P. 224. the Court as expressed by Erle, C. J., in *Bailey v. Sweeting*, *infra*, p. 172.

<sup>2</sup> *Richards v. Porter* seems also irreconcilable with the opinion of <sup>3</sup> 9 B. & C. 561. See, also, *Aroher v. Baynes*, 5 Exch. 625; 20 L. J., Ex. 54.

Bench, in 1829. The written memorandum was contained in two letters, one from the vendor's attorney, who wrote to ask for payment "for the ash timber which you purchased of him. . . . The value, at 1s. 6d. per foot, amounts to the sum of 17l. 8s. 6d. I understand your objection to complete your contract is on the ground that the timber is faulty and unsound, but there is sufficient evidence to show that the same timber is very kind and superior, &c., &c." The defendant replied, "I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1s. 6d. per foot, *to be sound and good*, which I have some doubts whether it is or not, but he promised to make it so, *and now denies it*." Held, that the letters were not consistent, and did not satisfy the statute. Bayley, J., said: "What the real terms of the contract were is left in doubt, and must be ascertained by verbal testimony. The object of the statute was that the note in writing should exclude all doubt as to the terms of the contract, and that object is not satisfied by defendant's letter." The other judges concurred.

Boydell v.  
Drummond.

The leading case under the *fourth* section of the Statute of Frauds, usually cited in all disputes as to the construction of the words now under consideration, is *Boydell v. Drummond*,<sup>1</sup> decided in the King's Bench in 1809. The defendant was sued as one of the subscribers for the celebrated Boydell prints of scenes in Shakespeare's plays, and the terms of the subscription were set out in a prospectus. The proof offered was the defendant's signature in a book entitled "Shakespeare Subscribers, their Signatures." But there was nothing in the book referring to the prospectus, and it was impossible to connect the book with the prospectus showing the terms of the bargain, without parol testimony. Some letters of the defendant were also offered, but equally void of reference to the terms of the bargain. The plaintiff was nonsuited at *Nisi Prius*, and the nonsuit was confirmed by the unanimous opinion of the

<sup>1</sup> 11 East, 142. See, also, *Fitzmaurice v. Bayley*, 9 H. of L. 78.

judges, Lord Ellenborough, C. J., Grose, Le Blanc, and Bayley, JJ.

In *Dobell v. Hutchinson*,<sup>1</sup> in 1835, the King's Bench held, under the 4th section of the Act, that in a sale at auction where the letters of the defendants, the purchasers, referred distinctly to the conditions of sale signed by the plaintiff, and which they had in their hands, the clause of the statute was completely satisfied, because no parol evidence of any kind was requisite to show the contract, except proof of handwriting, which is necessary in all cases. *Dobell v. Hutchinson.*

So in *Laythorp v. Bryant*,<sup>2</sup> in 1836, the Exchequer of Pleas held that the defendant, who had signed a memorandum of his purchase at auction, was bound by it, although imperfect in itself, because it referred to the conditions of sale, and those conditions were on the same paper, the agreement having been written on the back of a paper containing the terms and conditions. *Laythorp v. Bryant.*

It was held in a recent case in the Common Pleas that the note or memorandum required by the statute need not be addressed to or pass between the parties, but may be addressed to a third person. In *Gibson v. Holland*,<sup>3</sup> decided in 1865, one of the pieces of paper relied on as constituting the written note of the bargain was a letter written by the defendant to his own agent. Held, to be sufficient by Erle, C. J., and Willes and Keating, JJ. This case was decided principally upon the authority of Sir Edward Sugden's "Treatise on Vendors and Purchasers,"<sup>4</sup> in which he says: "A note or letter written by the vendor to any third person, containing directions to carry the agreement into execution, will (subject to the before-mentioned rules) be a sufficient agreement to take a case out of the statute," and on the authorities in the Chancery Reports there cited. Note in writing may be addressed to a third person.

No case has arisen under the statute on the question Writing in pencil.

<sup>1</sup> 3 Ad. & E. 370.

<sup>2</sup> 2 Bing. N. C. 735.

<sup>3</sup> L. R. 1 C. P. 1; 35 L. J., C. P. 5.

<sup>4</sup> At p. 139, par. 89, in 14th Ed. See, also, Smith's Leading Cases, vol. i., p. 284, notes to *Birkmyr v. Darnell*.

whether the writing is required to be in ink, but there seems no reason to doubt that the common law rule would apply, and that a writing in pencil would be held sufficient to satisfy the 17th section.<sup>1</sup>

SECTION II.—WHAT IS A SUFFICIENT NOTE OR MEMORANDUM OF THE BARGAIN MADE.

After the production and proof (by the party seeking to enforce the contract) of a written note or memorandum, whether contained in one or several pieces of paper, the next inquiry which arises is whether the contents of the writing so proven form a sufficient note "of the bargain made."

4th section  
rigorously con-  
strued.

Wain v. War-  
ters.

So far as the 4th section of the statute is concerned, a very rigorous interpretation was placed on it in an early case, and is now the settled rule. In *Wain v. Warlters*,<sup>2</sup> which was the case of a promise in writing to pay the debt of a third person, but where the consideration for the promise was not stated in the writing, it was held that parol proof of the consideration was inadmissible under the statute, and the promise was therefore held void as *nudum pactum*. The case turned on the construction of the word "agreement," which was held to include all the stipulations of the contract, showing what *both* parties were to do, not the mere "promise" of what the party to be charged undertook to do. The consideration was therefore held to be a part of the "agreement," and as the statute required the whole "agreement," or some note or memorandum of it, to be in writing, the Court inferred that a memorandum which showed no consideration must either be the whole agreement, and in that case void as *nudum pactum*, or part only of the agreement, and in that case insufficient to satisfy the statute. The judges were Lord Ellenborough, C. J., and Grose, Lawrence, and Le Blanc, JJ.

Although this case was strongly controverted, chiefly in

<sup>1</sup> See *Geary v. Physic*, 5 B. & C. 234.

<sup>2</sup> 5 East, 10.

the courts of equity, as will be seen by reference to the argument of Taunton in the case of *Phillips v. Bateman*,<sup>1</sup> where he sums up all the objections to the decision, it was upheld and followed in subsequent cases,<sup>2</sup> and the law now remains settled as it was propounded in *Wain v. Warlters*, except so far as guarantees are concerned, in relation to which the legislature intervened and made special provision in 19 & 20 Vict. c. 97, s. 3.

But under the 17th section of the statute the decisions have not maintained so rigorous a construction, and the judges have repeatedly referred to the distinction between the word "agreement" in the fourth section and "bargain" in the seventeenth. The cases will now be considered with reference exclusively to the contract of sale under the latter section, and to the inquiry whether, and to what extent, it is necessary that the writing should show, 1st, the names of the parties to the sale; 2ndly, the terms and subject-matter of the contract.

17th section  
more liberally  
construed.

On the first point, it is settled to be indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favour he is charged. The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by A. does not bind him, save to the person to whom the promise was made, and until that person's name is shown it is impossible to say that the writing contains a memorandum of the bargain.

Names or descriptions of parties must be shown.

In *Champion v. Plummer*,<sup>3</sup> the plaintiff, by his agent, wrote down in a memorandum-book the terms of a verbal

*Champion v. Plummer.*

<sup>1</sup> 16 East, 356—370.

<sup>2</sup> *Saunders v. Wakefield*, 4 B. & Ald. 595; *Jenkins v. Reynolds*, 3 B. & B. 14; and *Lyon v. Lamb*, there cited at p. 22; *Morley v. Boothby*, 3 Bing. 107; *Fitzmaurice v. Bayley*,

9 H. L. 79. And see the authorities under the 4th section collected in Sugden's *Vendor and Purchaser*, p. 184, 14th ed.

<sup>3</sup> 3 B. & P. 252.



sale to him by the defendant, and the defendant signed the writing, but the words were simply "Bought of W. Plummer, &c.," with no name of the person who bought. Sir James Mansfield, C. J., said, "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. *It would prove a sale to any other person as well as to the plaintiffs.*"

Allen v. Bennett.

In *Allen v. Bennett*,<sup>1</sup> the agreement was written in a book belonging to the plaintiff, and was signed by the defendant's agent. But the plaintiff's name was not in the book, and was not mentioned in the written memorandum. This was considered insufficient, but the defect was afterwards supplied by other writings showing the plaintiff to be the person with whom the bargain was made.

Williams v. Lake.

In *Williams v. Lake*,<sup>2</sup> which was under the fourth section, the defendant wrote a note binding himself as guarantor, and gave it to a third person for delivery. But the name of the person to whom the note was addressed was not written in the note. Held, by all the judges, insufficient to satisfy the statute.

Sarl v. Bourdillon.

In *Sarl v. Bourdillon*,<sup>3</sup> under the 17th section, the defendant signed an order for goods in the plaintiff's order-book, and the plaintiff's name was on the fly-leaf of his order-book in the usual way, and this was held sufficient under the statute.

Vandenburgh v. Spooner.

*Vandenburgh v. Spooner*<sup>4</sup> was a case in which the facts were peculiar. The plaintiff had purchased a quantity of marble at the sale of a wreck. He sold it to the defendant, the amount being more than 10*l.* The defendant signed this memorandum, "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenburgh, now lying at the Lyme Cobb, at 1*s.* per foot." After the defendant had signed this document, he wrote out what he

<sup>1</sup> 3 Taunt. 169. See, also, *Cooper v. Smith*, 15 East, 103, and *Jacob v. Kirke*, 2 M. & R. 222.

<sup>2</sup> 29 L. J., Q. B. 1; 2 E. & E. 849.

<sup>3</sup> 26 L. J., C. P. 78; 1 C. B., N. S. 188.

<sup>4</sup> L. R. 1 Ex. 316; 35 L. J., Ex. 201.

alleged to be a copy of it, which, at his request, the plaintiff, supposing it to be a genuine copy, signed. This was in the following words:—"Mr. J. Vandeburgh agrees to sell to W. D. Spooner the several lots of marble purchased by him, now lying at Lyme, at one shilling the cubic foot, and a bill at one month." Held, that the note signed by the purchaser, although it contained the plaintiff's name, only mentioned it as a part of the description of the goods so as to identify them, but did not mention the plaintiff as *seller* of the goods, and that the memorandum was therefore insufficient.

The latest case<sup>1</sup> was in the Common Pleas on these facts. *Newell v. Radford.* The defendant was a flour-dealer, and the plaintiff a baker. The defendant's agent entered in the plaintiff's book the following words:—"Mr. Newell, 32 sacks culasses, at 39s. 280 lbs. To await orders. John Williams."

The defendant insisted, on the authority of *Vandeburgh v. Spooner*, that as it was impossible to tell from this memorandum which was buyer and which was seller, the memorandum was insufficient, but the Court held that parol evidence had been properly admitted to show the trade of each party, and thus to create the inference from the circumstances of the case that the baker was the buyer of the flour. There was also some correspondence referred to, showing who was the buyer and who the seller.

But although the authorities are consistent in requiring that the memorandum should show who are the parties to the contract, it suffices if this appear by description instead of name. If one party is not designated at all, plainly the whole contract is not in writing, for "it takes two to make a bargain." In such a case the common law would permit parol testimony to show who the other is, but this is forbidden by the statute. But if the writing shows by description with whom the bargain was made, then the statute is satisfied, and parol evidence is admissible to *apply the description*: that is, not to show with whom the bargain is

Description of parties suffices instead of name.

<sup>1</sup> *Newell v. Radford* L. R. 3 C. P. 52; 37 L. J., C. P. 1.

made, but who is the person described, so as to enable the Court to understand the description. This is no infringement of the statute, for in all cases where written evidence is required by law there must be parol evidence to apply the document to the subject-matter in controversy. The cases in which this principle has been most clearly illustrated are those which arise in a very common course of mercantile dealing, where an agent signs a contract in his own name and without mentioning his principal.

Where agent  
signs his own  
name instead  
of principal's.

It is settled that though in dealings of this kind it is not competent for the agent thus contracting to introduce parol proof to show that he did not intend to bind himself, because this would be to contradict what he had written, it is competent for the other party to show that the contract was really made with the principal who had chosen to describe himself by the name of his agent, just as it would be admissible to show his identity if he had used a feigned name.

Trueman v.  
Loder.

In *Trueman v. Loder*,<sup>1</sup> the defendant was sued on a broker's sold note in these words: "London, 28th April, 1835. Sold for Mr. Edward Higginbotham, &c., &c." The proof was, that in 1832 the defendant, a merchant of St. Petersburg, had established Higginbotham to conduct the defendant's business in London in the name of Higginbotham, which was painted outside the counting-house and employed in all the contracts. The agent had no business, capital, nor credit of his own, but did everything with the defendant's money and for his benefit under his instructions. The case was argued by very able counsel in Michaelmas Term, 1838, and the judges took time to consider till the ensuing term, when Lord Denman delivered the opinion of the Court, composed of himself, and Patteson, Williams, and Coleridge, JJ. On the question made, that the name of the defendant was not in the written contract, the Court said: "Among the ingenious arguments pressed by the defendant's counsel, there was one which it may be fit to notice; the supposition that parol evidence was introduced

<sup>1</sup> 11 Ad. & E. 587.

to vary the contract, showing it not to have been made by Higginbotham, but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."<sup>1</sup>

The leading case for the converse proposition, namely, that the agent who has contracted in his own name will not be allowed to offer parol evidence for the purpose of proving that he did not intend to bind himself, but only his principal, is *Higgins v. Senior*,<sup>2</sup> decided in the Exchequer in 1841, in which also the judges took time to consider until the ensuing term, when Parke, B., delivered the judgment of the Court, composed of himself and Alderson, Gurney, and Rolfe, BB. The opinion states the question submitted to be, "Whether in an action or an agreement in writing, purporting on the face of it to be made by the defendant, and to be subscribed by him, for the sale and delivery by him of goods above the value of 10*l.*, it is competent for the defendant to discharge himself on an issue on the plea of *non assumpsit*, by proving that the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time when this agreement was made and signed." Held, in the negative. The learned Baron then proceeded to lay down the principles on which this conclusion was reached, as follows: "There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give

<sup>1</sup> See, also, *Smith's Leading Cases*, Davenport, p. 352, et seq.  
ed. 1867, in notes to *Thomson v.*      <sup>2</sup> 8 M. & W. 83*l.*

the benefit of the contract on the one hand to, and charge with liability on the other, the un-named principals; and this, whether the agreement be or be not required to be in writing, by the Statute of Frauds: and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind; but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

"But, on the other hand, to allow evidence to be given, that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done."<sup>1</sup>

What written note of the terms of the contract suffices.

We now come to the second point of the inquiry, and must consider to what extent it is necessary that the writing should contain the terms and subject-matter of the contract, in order to be deemed a sufficient note or memorandum "of the bargain."

Distinction between "agreement" and "bargain."

It has already been seen that the decisions establish the necessity under the fourth section of proving the whole "agreement" in writing, in order to satisfy the statute. Independently of authority, one would think that "bargain" and "agreement" are words so identical in meaning, when applied to a contract for the sale of goods, as to admit of no possible distinction; but the authorities do nevertheless distinguish them in a manner too plain to permit a doubt as to the law.

*Egerton v. Mathews.*

In *Egerton v. Mathews*,<sup>2</sup> the plaintiff had been non-suited at Guildhall, by Lord Ellenboro', on the authority of *Wain v. Warlters*.<sup>3</sup> The writing was, "We agree to give Mr. Egerton 19*d.* per pound for thirty bales of Smyrna cotton,

<sup>1</sup> See Smith's Leading Cases, Vol. II., p. 349, in notes to Thomson v. Davenport, where the whole subject is more fully treated than comports

with the design of the present treatise.

<sup>2</sup> 6 East, 307.

<sup>3</sup> 5 East, 10.

customary allowance, cash three per cent., as soon as our certificate is complete." It was signed and dated.

Lord Ellenborough is reported, when granting a rule *nisi*, to have assented to a distinction between the two cases, and to have said on cause shown, "This was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signature to it is all that the statute requires." This last expression would seem to indicate that the difficulty in his lordship's mind was, that the bargain was not complete because the plaintiff had not signed (a point not fully settled by authority, till 1886, in *Laythoarp v. Bryant*,<sup>1</sup> as will be seen hereafter).<sup>2</sup> But Lawrence, J., said: "The case of *Wain v. Warlters*, proceeded on this, that in order to charge one man with the debt of another, the *agreement* must be in writing, which word *agreement* we considered as properly including the *consideration* moving to, as well as the *promise* made by the party to be so charged." The learned judge, however, did not explain why the word "bargain" does not also include the terms on both sides, as was observed by Holroyd, J., when he said: "It appears to me that you cannot call that a memorandum of a bargain, which does not contain the terms of it;" and, by Bayley, J., when he held in the same case<sup>3</sup> that the language of the two sections of the statute was in substance the same, and that the word "*bargain*" means "the terms upon which parties contract."

In *Hinde v. Whitehouse*,<sup>4</sup> the memorandum consisted of the auctioneer's catalogue, signed by him as agent of both parties, showing the goods sold, their marks, weight, and price; but the Court held this insufficient, because there was another paper containing the conditions of the sale, which had been read, but was not made a part of the written note of the bargain by internal evidence contained in the signed paper.

<sup>1</sup> 2 Bing. N. C. 735.

C. 948.

<sup>2</sup> *Post*, p. 174.

<sup>4</sup> 7 East, 558.

<sup>3</sup> *Kenworthy v. Schofield*, 2 B. &

Laythoarp v.  
Bryant.

In *Laythoarp v. Bryant*,<sup>1</sup> in 1836, which was on the 4th section, Tindal, C. J., said: "*Wain v. Warlters* was decided on the express ground that an agreement under the fourth section imports more than a bargain under the 17th." Park, J., said: "The cases on the 17th section of the statute might very much be put out of question, because the language of that section is different from the language of the fourth."

Sarl v. Bour-  
dillon.

In *Sarl v. Bourdillon*,<sup>2</sup> the written note was for the sale of "candlesticks, complete." It was proven that the parol bargain was that the candlesticks should be furnished with a gallery to carry a shade, and defendant insisted that the written note was insufficient; but after time to consider, the decision of the Court was delivered by Cresswell, J., who said: "We do not feel obliged to yield to this argument. The memorandum states all that *was to be done by the person charged*, viz., the defendant, and according to the case of *Egerton v. Mathews*,<sup>3</sup> that is *sufficient to satisfy the 17th section of the Statute of Frauds, though not to make a valid agreement in cases within the 4th section.*"

Price not stated  
where agreed  
on.

Elmore v.  
Kingscote.

In *Elmore v. Kingscote*,<sup>4</sup> there had been a verbal sale of a horse for 200 guineas, but the only writing was a letter from defendant to plaintiff, in the following words: "Mr. Kingscote begs to inform Mr. Elmore that if the horse can be proved to be five years old on the 18th of this month in a perfectly satisfactory manner, of course he shall be most happy to take him: and if not most clearly proved, Mr. K. will most decidedly have nothing to do with him." The Court held this insufficient, saying, "The price agreed to be paid constituted a material part of the bargain."

Ashcroft v.  
Morrin.

In *Ashcroft v. Morrin*,<sup>5</sup> defendant ordered certain goods to be sent him, saying, "Let the quality be fresh and good, and on moderate terms." On objection made that the price was not stated, the Court said: "The order is to send certain quantities of porter and other malt liquor, on moderate

<sup>1</sup> 2 Bing. N. C. 735.

<sup>2</sup> 6 East, 307.

<sup>3</sup> 26 L. J., C. P. 78; 1 C. B., N. S.  
188.

<sup>4</sup> 5 B. & C. 583.

<sup>5</sup> 4 M. & G. 450.

terms. Why is not that sufficient? That is the contract between the parties:" and set aside the non-suit according to leave reserved.

In *Acebal v. Levy*,<sup>1</sup> there was a special count alleging an agreement for the sale of a cargo of "nuts, at the then shipping price at Gijon, in Spain," and the parol evidence was to that effect. Plaintiff not being successful in establishing the validity of the contract by satisfactory proof of delivery and acceptance, then attempted to support his case by a letter which did not state the price, and by insisting that a contract of sale was valid without statement of price, because the law would imply a promise to pay a reasonable price. But the Court, declining to determine how this would be if no price had really been agreed on, held that where there had been an actual agreement as to price shown by parol, the written paper, which did not contain that part of the bargain, was insufficient to satisfy the statute.

In *Hoadley v. McLaine*,<sup>2</sup> the same Court was called on to decide, in the ensuing term, the very point which had been left undetermined in *Acebal v. Levy*. The defendant gave plaintiff an order in these words: "Sir Archibald McLaine orders Mr. Hoadley to build a new, fashionable, and handsome landaulet, with the following appointments, &c. \* \* \* the whole to be ready by the 1st March, 1883." Nothing was said about price. The judges were all of opinion that as the writing contained *all that was agreed on*, it was a sufficient note of the bargain. Tindal, C. J., said: "This is a contract which is silent as to price, and the parties therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth." Park, J., said: "It is only necessary that price should be mentioned, *when price is one of the ingredients of the bargain* \* \* \* and it is admitted on all hands that if a specific price be agreed on, and that price is omitted in the memorandum, the memorandum is insufficient."

In *Goodman v. Griffiths*,<sup>3</sup> the plaintiff showed defendant

Price not stated, where it had not been agreed on.  
*Hoadley v. McLaine.*

*Goodman v. Griffiths.*

<sup>1</sup> 10 Bing. 376.

<sup>2</sup> 26 L. J., Ex. 145, and 1 H. & N.

<sup>3</sup> 10 Bing. 482.

574.



an invoice of his prices, and then agreed verbally to sell to him at a deduction of twenty-five per cent. on those prices for cash, whereupon defendant wrote an order: "Please to put to my account four mechanical binders," and signed it. Held, that as there had been a parol agreement as to price, which was not included in the note of the bargain, the statute was not satisfied.

General rule as to price.

It is plainly deducible from the foregoing decisions, that so far as price is concerned, the rule of law is, that where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. But the law only does this in the absence of an agreement, and therefore, where the price is fixed by mutual consent, that price is part of the bargain, and must be shown in writing in order to satisfy the statute; and, finally, that parol evidence is admissible to show that a price was actually agreed on, in order to establish the insufficiency of a memorandum which is silent as to price.

Other terms of the contract must be so expressed as to be intelligible.

As to the other terms of the contract, it is necessary that they should so appear by the written papers as to enable the Court to understand what they actually were, in order to satisfy the statute.

It has already been shown that where these terms are contained in different pieces of paper, the several writings which are offered as constituting the bargain must be consistent, and not contradictory.<sup>1</sup> In *Jackson v. Lowe*,<sup>2</sup> and *Allen v. Bennett*,<sup>3</sup> the different writings were held consistent, so as to form a sufficient memorandum, while the reverse was held as to the written evidence offered in *Cooper v. Smith*,<sup>4</sup> *Richards v. Porter*,<sup>5</sup> *Smith v. Surman*,<sup>6</sup> and *Archer v. Baynes*.<sup>7</sup>

*Thornton v. Kempster*.

In *Thornton v. Kempster*,<sup>8</sup> the broker's bought note

<sup>1</sup> *Supra*, p. 153.

<sup>2</sup> 1 Bing. 9.

<sup>3</sup> 3 Taunt. 169.

<sup>4</sup> 15 East, 103.

<sup>5</sup> 6 B. & C. 437.

<sup>6</sup> 9 B. & C. 561.

<sup>7</sup> 5 Ex. 625.

<sup>8</sup> 5 Taunt. 786.

described the article bought as "sound and merchantable Riga Rhine hemp," and the sold note as "St. Petersburg clean hemp," the former description being of an article materially different in quality and value from the latter. Held, that the *substance of the contract* was not shown by the written bargain evidenced by two papers that materially varied from each other.

In *Archer v. Baynes*,<sup>1</sup> the Court held the correspondence between the parties an insufficient note of the bargain, because not containing all the terms of the contract. The Court say of the defendant: "It is clear, from the letters, that he had bought the flour from the plaintiff upon some contract or other, but whether he had bought it on a contract that he should take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a sample which had been delivered to him on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties does not appear to be settled by the contract in writing."

*Archer v.  
Baynes.*

In *Valpy v. Gibson*,<sup>2</sup> in which the Statute of Frauds was not in question, it was contended on behalf of the plaintiffs that the terms of the contract did not appear, because the mode and time of payment had not been specified. But the Court said: "The omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. Goods may be sold, and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances." And the Court held in the case before it, that the contract between the parties was one of the nature above described, and was valid.

*Valpy v. Gib-  
son.*

A recent decision of the Common Pleas has decided, in opposition to the intimation of opinion in *Blackburn* on

A letter re-  
pudiating a con-  
tract may be a

<sup>1</sup> 5 Ex. 625; 20 L. J., Ex. 54.

<sup>2</sup> 4 C. B. 835.

sufficient note  
of it.

Bailey v.  
Sweeting.

Sales,<sup>1</sup> that a letter repudiating a contract may be so worded as to furnish a sufficient note of the bargain to satisfy the 17th section. In *Bailey v. Sweeting*,<sup>2</sup> the letter produced was as follows: "In reply to your letter of the 1st instant, I beg to say that the only parcel of goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have, for reasons made known by you at the time, &c., &c." Erle, C. J., in his opinion said the letter "in effect says this to the plaintiff: 'I made a bargain with you for the purchase of chimney-glasses at the sum of 38*l.* 10*s.* 6*d.*, but I declined to have them because the carrier broke them.' Now the first part of the letter is unquestionably a note or memorandum of the bargain. It contains the price and all the substance of the contract, and there could be no dispute that if it had stopped there, it would have been a good memorandum of the contract within the meaning of the statute." The learned Chief Justice then referred to the passage from *Blackburn on Sales*, and declared his inability to assent to it, and in this the other judges, Williams, Willes, and Keating concurred.<sup>3</sup>

Wilkinson v.  
Evans.

In *Wilkinson v. Evans*,<sup>4</sup> the defendant also refused the goods, writing on the back of the invoice: "The cheese came to-day, but I did not take them in, for they were very badly crushed; so the candles and the cheese is returned." Held, that this was evidence for the jury that the invoice contained all the stipulations of the contract, and that defendant's objection was not to the plaintiff's statement of the contract, but related to the performance of it. Non-suit set aside.

Parol proof of  
acceptance of  
written proposal  
sufficient to  
bind signer of  
proposal.

A note or memorandum of the bargain is sufficient, although it contain a mere proposal, if supplemented by parol proof of acceptance. This had been held, by *Kindersley, V.-C.*, in *Warner v. Willington*,<sup>5</sup> and that case was

<sup>1</sup> Page 66.

<sup>2</sup> 30 L. J., C. P. 150; 9 C. B., N. S. 843.

<sup>3</sup> See *supra*, p. 157, remarks on

*Richards v. Porter.*

<sup>4</sup> L. R. 1, C. P. 407; 35 L. J., C. P. 224.

<sup>5</sup> 3 Drew. 523, and 25 L. J., Ch. 632.

followed by the Court of Common Pleas, in *Smith v. Neale*,<sup>1</sup> and by the Exchequer, in *Liverpool Borough Bank v. Eccles*.<sup>2</sup> The question came before the Exchequer Chamber in *Reuss v. Picksley*,<sup>3</sup> and after full argument, the judges, six in number, unanimously confirmed the cases just cited, and expressed their approval of the reasoning of the Vice-Chancellor in *Warner v. Willington*.

In the United States it has been held that if terms of credit have been agreed on, or a time for performance fixed by the bargain, the memorandum will be insufficient if these parts of the bargain be omitted.<sup>4</sup>

<sup>1</sup> 2 C. B., N. S. 67, and 26 L. J., C. P. 143.

<sup>2</sup> 4 H. & N. 139; 28 L. J., Ex. 123.

<sup>3</sup> L. R. 1, Ex. 342; 35 L. J., Ex. 218.

<sup>4</sup> *Davis v. Shields*, 26 Wendell, 341; *Salmon Falls Company v. God-*

*dard*, 14 Howard (Sup. C. U. S.), 446; *Morton v. Dean*, 13 Metcalf, 388; *Soles v. Hickman*, 20 Penn. State, 180; *Buck v. Pickwell*, 1 Williams (Vermont), 167; *Elfe v. Gadsden*, 2 Rich (S. Ca.), 373.

## CHAPTER VII.

### OF THE SIGNATURE OF THE PARTY.

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Signature of the party to be charged alone is sufficient.

Contract good or not at election of party who has not signed.

Allen v. Bennett.

THE 17th section requires the writing to be "signed by the *parties* to be charged," &c., and the 4th section, "by the *party* to be charged," &c. Under both sections it is well-settled that the only signature required is that of the party *against* whom the contract is to be enforced. The contract, by the effect of the decisions, is good or not at the election of the party who has not signed.

In *Allen v. Bennett*,<sup>1</sup> in 1810, the Court of Common Pleas considered the question as already settled under the 17th section by authority and practice. And in *Thornton v. Kempster*,<sup>2</sup> the same Court declared that contracts may subsist which, by reason of the Statute of Frauds, could be enforced by one party, though not by the other.

In *Laythoarp v. Bryant*<sup>3</sup> the point was decided under the 4th section, after full argument.

The foregoing decisions have never since been questioned, and the law on the subject is settled not only by them, but by the very recent case of *Reuss v. Picksley*,<sup>4</sup> in *Cam.*

<sup>1</sup> 3 Taunt. 169.

238.

<sup>2</sup> 5 Taunt. 786.

<sup>4</sup> Law R. 1 Ex. 342; 35 L. J., Ex.

<sup>3</sup> 2 Bing. N. C. 735, and 3 Scott,

218.

Scacc., and the decisions quoted, *ante* p. 172, in which it was held that a written proposal, signed by the party to be charged, was a sufficient note of the bargain, if supplemented by parol proof of acceptance by the other party.

The signature required by the statute is not confined to the actual subscription of his name by the party to be charged.

Thus, a mark made by a party as his signature is sufficient, if so intended. And in *Baker v. Denning*,<sup>1</sup> where the question arose under the 5th section of the statute, which relates to wills and devises, the Court held, that it was not necessary to show that the party signing by a mark was unable to write his name: and the judges expressed the opinion, that a mark would be a good signature even if the party signing was able to write his name.

Mark sufficient, or pen held by a third person.

In *Helshaw v. Langley*,<sup>2</sup> the signature of a party was decided to be sufficient, when he, being unable to write, held the top of the pen, while another person wrote his signature.

But still there must be a signature, or a mark intended as such; and a description of the signer, though written by himself at the foot of the paper, is insufficient. Thus, a letter by a mother to a son, beginning "My dear Robert," and ending "Your affectionate mother," with a full direction containing the son's name and address, was held not a sufficient signature by the mother.<sup>3</sup>

Description of the writer insufficient.

Whether a signature by initials would suffice seems not to have been decided expressly. Initials.

In *Hubert v. Moreau*,<sup>4</sup> the question was raised under the Act, 6 Geo. IV. c. 16, s. 131, which made void a promise by a bankrupt to pay a debt from which he had been discharged, unless the promise was made in writing, "signed by the bankrupt." The report states, that the letter had no name attached to it, but something that looked like an M. Best, C. J., said, on looking at it: "It may be an M., or it may be a waving line; but if it be an M., I am of

Hubert v. Moreau.

<sup>1</sup> 8 Ad. & E. 94.

<sup>2</sup> Selby v. Selby, 3 Mer. 2.

<sup>3</sup> 11 L. J., Ch. 17.

<sup>4</sup> 2 C. & P. 528.

opinion that it is not sufficient, as the statute requires that the promise should be signed. It is not the signature of a man's name. I have no doubt upon the subject." His Lordship refused the plaintiff permission to prove by parol that the defendant usually signed in that way. Afterwards a witness was called, who stated as his opinion that the mark which was taken to be an M. was nothing but a flourish, and the plaintiff was thereupon non-suited. The Court in banc afterwards refused a rule to set aside the non-suit, the rule being taken on the ground that the M. was a sufficient signing, because it was the sign used by the party to denote that the instrument was his.

In the report of the same case, as given in 12 Moore, C. P. 216, the language of the Court, in refusing the new trial, would indicate that as a question of *fact* there was no mark appended to the writing, and placed there by the writer with the intention of making it his signature. The Chief Justice put the case as follows: "Undoubtedly the signing by a mark would satisfy the meaning of the statute, *but here there is nothing intended to denote a signature*, nor does the name of the defendant appear in any part of the letter."

Sweet v. Lee

In *Sweet v. Lee*,<sup>1</sup> the writing was signed with the initials T. L., but in the writing were the words "Mr. Lee" in the hand-writing of defendant, and nothing was decided as to the sufficiency of the signature. And the same observations apply to the *Nisi Prius* cases of *Phillimore v. Barry*, 1 Campb. 518, and *Jacob v. Kirk*, 2 Mood. & Rob. 221.

These cases have been cited in some of the text-books<sup>2</sup> as giving colour to the inference, that a signature by initials is insufficient to satisfy the statute. Sir Edward Sugden, however, draws the opposite conclusion in his work on *Vendors and Purchasers*.<sup>3</sup> It would indeed be a strange anomaly, that a man's mark affixed by him to an instrument should be a sufficient signature, but that his initials fixed by himself should not be so. The true principle that seems

<sup>1</sup> 3 M. & G. 452.

Taylor on Ev. 877, ed. 1864.

<sup>2</sup> Roscoe on Ev. 292, ed. 1866,

<sup>3</sup> Page 144, ed. 1862.

deducible is, that if the initials are intended as a signature by the party who writes them, this shall suffice, but not otherwise.<sup>1</sup>

The signature may be in writing or in print, and it may be in the body of the writing, or at the beginning or end of it. But when the signature is not placed in the usual way at the foot of the written or printed paper, it becomes a question of intention, a question of fact to be determined by the other circumstances of the case, whether the name so written or printed in the body of the instrument was appropriated by the party to the recognition of the contract.

Signature may be in print, and in the body of the paper, or at beginning or end. When not subscribed, a question of fact.

In *Saunderson v. Jackson*,<sup>2</sup> the plaintiff, on giving to the defendants an order for goods, received from them a bill of parcels. The heading of the bill was printed as follows: "London: Bought of Jackson and Hanson, distillers, No. 8, Oxford Street," and then followed in writing, "1000 gallons of gin, 1 in 5 gin, 7s., £350." There was also a letter, signed by the defendants, in which they wrote to plaintiff, about a month later, "We wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder. Must request you to return our pipes." Lord Eldon said: "The single question is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name, as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the Statute of Frauds." Thus far the case would not amount to much as an authority on the point under discussion. His Lordship went on to say: "It has been decided,<sup>3</sup> that if a man draw up an agreement in his own hand-writing, beginning 'I, A. B., agree,' and leave a place for signature at the bottom, but never sign it, it may be

*Saunderson v. Jackson.*

<sup>1</sup> See remarks of Lord Westbury in *Caton v. Caton*, L. R. 2, H. of L. 127, 143.

<sup>2</sup> 2 B. & P. 138.

<sup>3</sup> The case referred to by his Lord-

ship is *Knight v. Cockford*, Esp. N. P. 190. See, also, *Lobb v. Stanley*, 5 Q. B. 574, and *Durrell v. Evans*, 1 H. & C. 174, and 81 L. J., Ex. 337.



considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until further signed. This last case is stronger than the one now before us, and affords an answer to the argument, that this bill of parcels was not delivered as a note or memorandum of the contract." This last sentence refers to the argument of Lens, Serjt., who admitted that the printed name might have amounted to a signature, if the bill of parcels had been intended to express the contract, *quà* contract, but contended that this was not the intention.

Schneider v.  
Norris.

In *Schneider v. Norris*,<sup>1</sup> the circumstances were exactly the same as in the preceding case, except that the name of the plaintiff as buyer was written in the bill of parcels rendered to him in the defendant's own hand-writing, and all the judges were of opinion that this was an adoption or appropriation by the defendant of the name, printed on the bill of parcels, as his signature to the contract. Lord Ellenborough said: "If this case had rested merely on the printed name, unrecognised by and not brought home to the party, as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt, whether it would not have been intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged, by words recognising the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his: and it is the same in substance, as if he had written 'Norris & Co.' with his own hand. He has, by his handwriting, in effect, said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract." Le Blanc, J., compared the case to one, where a party should stamp his name on a bill of

<sup>1</sup> 2 Maule & S. 286.

parcels. Bayley, J., put his opinion on the ground that the defendant had signed the plaintiffs' names as purchasers, and thereby recognised his own printed name as that of the seller. And Dampier, J., on much the same idea, that is, that the defendant by writing the name of the buyer on a paper in which he himself was named as the seller, recognised his name sufficiently to make it a signature.

In *Johnson v. Dodgson*,<sup>1</sup> the defendant wrote the terms of the bargain in his own book, beginning with the words: "Sold John Dodgson," and required the vendor to sign the entry. The Court held this to be a signature by Dodgson, Lord Abinger saying that: "The cases have decided that though the signature be in the beginning or middle of the instrument, it is as binding as if at the foot; the question being always open to the jury whether the party not having signed it regularly at the foot meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it." Parke, B., concurred, on the authority of *Saunderson v. Jackson*, and *Schneider v. Norris*, which he recognised and approved. *Johnson v. Dodgson.*

In the recent case of *Durrell v. Evans*, in *Cam. Scac.*<sup>2</sup> (*post*, p. 186), the cases of *Saunderson v. Jackson*, *Schneider v. Norris*, and *Johnson v. Dodgson* were approved and followed.

In *Hubert v. Treherne*,<sup>3</sup> which arose under the fourth section, it appeared that an unincorporated company called The Equitable Gas Light Company, accepted a tender from the plaintiff for conveying coals. A draft of agreement was prepared by the order of the directors, and a minute entered as follows: "The agreement between the company and Mr. Thomas Hubert for carrying our coals, &c., was read and approved, and a fair copy thereof directed to be forwarded to Mr. Hubert." The articles began by reciting the names of the parties, Thomas Hubert of the one part, and Treherne and others, trustees and directors, &c., of the other part; and closed, "As witness our hands." The articles *Hubert v. Treherne.*

<sup>1</sup> 2 M. & W. 653.

<sup>2</sup> 1 H. & C. 174; 31 L. J., Ex. 337.

<sup>3</sup> 3 M. & G. 743.

were not signed by anybody, but the paper was maintained by the plaintiff to be sufficiently signed by the defendants, because the names of defendants were written in the document by their authority. On motion to enter nonsuit, all the judges held that the instrument on its face, by the concluding words, showed that the intention was that it should be subscribed, and that it was not the meaning of the parties that their names written in the body of the paper should operate as their signatures. Maule, J., said: "In cases of this description two questions may occur; first, whether the agreement contains that which the Statute of Frauds requires, which is a question of law; secondly, whether the agreement has been signed by the party to be charged therewith, which is a question of fact. I think this rule should be made absolute on the first point. The articles of agreement do not seem to me to be a memorandum signed by anybody. Before the Statute of Frauds, no one could have entertained a doubt upon that point. Since the Statute, the Courts, anxious to relieve parties against injustice, have not unfrequently stretched the language of the Act. \* \* \* \* If a party writes, 'I, A. B., agree, &c.,' with no such conclusion as is found here, 'as witness our hands,' it may be that this is a sufficient signature within the statute to bind A. B. \* \* \* But it would be going a great deal further than any of the cases have hitherto gone to hold that this was an agreement signed by the party to be charged. This is no more than if it had been said by A. B. that he *would* sign a particular paper."

Caton v. Caton.

The most full and authoritative exposition of the law on this subject is to be found in the very recent case of *Caton v. Caton*,<sup>1</sup> decided in the House of Lords in May, 1867. The paper there relied on was a memorandum of the terms of a marriage settlement, drawn up in the handwriting of the future husband, and taken to a solicitor's for execution, but the settlement was waived by the parties, and the memorandum was subsequently set up as containing the

<sup>1</sup> L. R. 2, H. of L. 127.

agreement. There were numerous clauses, in some of which the name "Mr. Caton" was written in the body of the paper, and in others the initials "Rev. R. B. C.," and some contained neither name nor initials. It was held that although to satisfy the Statute of Frauds it is not necessary that the signature of a party should be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate *every material part* of the instrument; and that where, as in the case before the Court, the name of the party, when found in the instrument, appeared in such a way that it referred in each instance only to the particular part where it was found, and not to the whole instrument, it was insufficient. The language of Lord Westbury, whose opinion on this particular point was the most comprehensive of those delivered in the case, was as follows: "What constitutes a sufficient signature has been described by different judges in different words. In the original case upon this subject, though not quite the original case, but the case most frequently referred to as of the earliest date, that of *Stokes v. Moore* (1 Cox, 219), the language of the learned judge is that the signature must authenticate every part of the instrument; or, again, that it must give authenticity to every part of the instrument. Probably the phrases 'authentic,' and 'authenticity,' are not quite felicitous, but their meaning is plainly this, that the signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to every part of the instrument. The language of Sir William Grant, in *Ogilvie v. Foljambe* (3 Mer. 53), is (as his method was) much more felicitous. He says it must govern every part of the instrument. It must show that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. It follows, therefore, that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order

to comply with the statute, and to give authenticity to the whole of the memorandum." His Lordship then criticised the different clauses of the memorandum for the purpose of showing the insufficiency of the signature when tested by these rules, and proceeded: "Now an ingenious attempt has been made at the bar to supply that defect by fastening on the antecedent words 'In the event of marriage the undernamed parties,' and by the force of these words of reference to bring up the signature subsequently found and treat it as if it were found with the words of reference. My lords, if we adopted that device we should entirely defeat the statute. You cannot by words of reference bring up a signature and give it a different signification and effect from that which the signature has in the original place in which it is found. What is contended for by this argument differs very much from the process of incorporating into a letter or memorandum signed by a party another document which is specifically referred to by the terms of the memorandum so signed, and which, by virtue of that reference, is incorporated into the body of the memorandum. There you do not alter the signature, but you apply the signature not only to the thing (writing ?) originally given, but also to that which, by force of the reference, is, by the very context of the original, made a part of the original memorandum. But here you would be taking a signature intended only to have a limited and particular effect, and by force of the reference to a part of that document, you would be making it applicable to the whole of the document to which the signature in its original condition was not intended to apply, and could not, by any fair construction, be made to apply."

Signature may  
be referred,  
from what is  
signed to what  
is unsigned ;  
not the reverse.

The effect of these principles seems to be substantially that the reference to connect two papers or two clauses so as to make one signature apply to both, must be from what is signed to what is unsigned, not the reverse.

## CHAPTER VIII.

### AGENTS DULY AUTHORISED TO SIGN.

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It is not within the scope of this treatise to enter into the general subject of the law of agency, which is in no way altered by the statute. The agency may be proven by parol as at common law, and may be shown by subsequent ratification as well as by antecedent delegation of authority.<sup>1</sup>

<sup>1</sup> *Maclean v. Dunn*, 4 Bing. 722; afterwards reversed, 9 H. of L. 78, *Gosbell v. Archer*, 2 Ad. & E. 500; but not on the point stated in the text. *Sug. Vend. and Purch.*, 145. *Accebal v. Levy*, 10 Bing. 378; *Fitzmaurice v. Bayley*, 6 E. & B. 868,

Agent must be a third person, not the other contracting party.

It is necessary that the agent be a third person, and not the other contracting party. In *Blackburn on Sales*,<sup>1</sup> the learned author says that this is very doubtful law, and that there is nothing in the statute nor in reason to make the agency void when the grant of authority by one party to the other is clearly proven. There has, however, been no decision overruling those in which this point was expressly held by great authority.

*Wright v. Dannah.*

The first case that occurred was in 1809, where the plaintiff, in defendant's presence, wrote down the defendant's name, the goods, and the price. Lord Ellenborough nonsuited the plaintiff, saying: "The agent must be some third person, and cannot be the other contracting party."<sup>2</sup> This was the only point in the case.

*Farebrother v. Simmons.*

In *Farebrother v. Simmons*,<sup>3</sup> the auctioneer was plaintiff, and his counsel attempted to distinguish the case from *Wright v. Dannah* on the ground that in this latter case the person who made the memorandum as agent for the purchaser was the vendor himself, but in the case before the Court the auctioneer had no personal interest in the transaction. But Abbott, C. J., said: "In general, an auctioneer may be considered as the agent and witness of both parties. But the difficulty arises in this case from the auctioneer suing as one of the contracting parties. The case of *Wright v. Dannah* seems to me in point, and fortifies the conclusion at which I have arrived, viz., that the agent contemplated by the legislature, who is to bind a defendant by his signature, must be some third person, and not the other contracting party upon the record."

*Bird v. Boulter.*

In *Bird v. Boulter*,<sup>4</sup> the case was again that of auctioneer against purchaser, but the facts were different in this, that the person who signed the purchaser's name was not the auctioneer, but his clerk. The clerk said, when the wheat was knocked down to defendant, "Mr. Boulter, it is your wheat;" the defendant nodded, and the clerk made the entry in his sight, and the Court held the clerk to be a duly

<sup>1</sup> At p. 76—7.

<sup>2</sup> *Wright v. Dannah*, 2 Camp. 203.

<sup>3</sup> 5 B. & Ald. 333.

<sup>4</sup> 4 B. & Ad. 443.

authorised agent for that purpose. The case was distinguished from the two preceding cases by all the judges. Lord Denman: "The clerk was not acting merely as an automaton, but as a person known to all engaged in the sale, and *employed by any who told him to put down his name.*" Littledale, J.: "It is indeed irregular that the *real* buyer or *real* seller should make the other party his agent to sign a memorandum under the statute; but when that is done through a third person, the objection is removed. \* \* \* I think that a clerk employed as in this case, must, in an action brought by the auctioneer, be considered as *his* agent for the purpose of taking down the names, and *also as the agent of the several persons in the room for the same purpose.*" The other judges concurred, and said that there was no necessity for overruling *Farebrother v. Simmons*, but none of them mentioned *Wright v. Dannah* with disapproval. It is plain that the ruling in *Farebrother v. Simmons* might well be questioned, without shaking the decision in *Wright v. Dannah*. In *Farebrother v. Simmons* the plaintiff, the auctioneer, had in fact no interest in the contract, though legally entitled, by reason of his privity, to bring an action in his own name against the defendant. If the real vendor had sued, the signature of the auctioneer would indubitably have bound the purchaser, and courts might reasonably hesitate to uphold a decision which made the *validity of the contract* depend upon the question whether the action was brought in the *name* of the party or his agent.

The decisions as to the sufficiency of the evidence to prove authority for the agent's signature have not been numerous under the 17th section.

What evidence sufficient to prove authority.

In *Graham v. Musson*,<sup>1</sup> the plaintiff's traveller, Dyson, sold sugar to the defendant, and in the defendant's presence, and at his request, entered the contract in the defendant's book in these words: "Of North & Co., thirty mats Maurs. at 71s.; cash, two months. Fenning's Wharf. (Signed) JOSEPH DYSON."

*Graham v. Musson.*

<sup>1</sup> 5 Bing. N. C. 603.



It was contended that this was a note signed by the defendant, and that Joseph Dyson was his agent for signing; but the Court held on the evidence that Dyson was the agent of the vendor, and that the request by the purchaser that the vendor's agent should sign a memorandum of the bargain was no proof of agency to sign the purchaser's name; that the purpose of the buyer was probably to fix the seller, not to appoint an agent to sign his own name.

Graham v.  
Fretwell.

This case was decided by Tindal, C. J., Vaughan, Coltman and Erskine, JJ., in 1839, and was followed by the same Court in 1841, in *Graham v. Fretwell*,<sup>1</sup> with the concurrence of Maule, J., who had succeeded Vaughan, J., on the bench.

Durrell v.  
Evans.

The whole subject was fully discussed in the recent case of *Durrell v. Evans*, decided in the Exchequer by Pollock, C. B., and Bramwell and Wilde, BB., in 1861,<sup>2</sup> and reversed by the unanimous opinions of Crompton, Willes, Byles, Blackburn, Keating, and Mellor, JJ., in the Exchequer Chamber, in 1862.<sup>3</sup>

The facts were these: The plaintiff, Durrell, had hops for sale, in the hands of his factor, Noakes, and the defendant failed in an attempt to bargain for them with Noakes. Afterwards, the plaintiff and the defendant went together to Noakes's premises, and there concluded a bargain in his presence. Noakes made a memorandum of the bargain in his book, which contained a counterfoil, on which he also made an entry. He then tore out the memorandum and delivered it to the defendant, who kept it and carried it away. Before taking away the memorandum, the defendant requested that the date might be altered from the 19th to the 20th of October (the effect of this alteration, according to the custom of the trade, being to give to the defendant an additional week's credit), and the plaintiff and Noakes assented to this, and the alteration was accordingly made. The memorandum was in the following words:—

<sup>1</sup> 3 M. & G. 368.

*Durrell v. Evans*, 6 H. & N. 660.

<sup>2</sup> 30 L. J., Ex. 254; S. C. *nom.*

<sup>3</sup> 31 L. J., Ex. 337; 1 H. & C. 174.

"Messrs. Evans.

"Bought of J. T. & W. Noakes.

"Bags.	Pockets.	T. Durrell.	} 16 <i>l.</i> 16 <i>s.</i>
	93	Ryarsh & Addington.	

"Oct. 19<sup>th</sup> 20<sup>th</sup>, 1860."

The entry on the counterfoil was as follows:—

"Sold to Messrs. Evans.

"Bags.	Pockets.	T. Durrell.	} 16 <i>l.</i> 16 <i>s.</i>
	93	Ryarsh & Addington.	

"Oct. 19<sup>th</sup> 20<sup>th</sup>, 1860."

On the trial, before Pollock, C. B., the defendant contended that he had never signed or authorised the signature of his name as required by the 17th section to bind the bargain. The plaintiff contended that the name "Messrs. Evans" written on the counterfoil was so written by Noakes as the defendant's agent; that if written by himself, it would have been a sufficient signature according to the authority of *Johnson v. Dodgson* (*ante*, p. 179), and that he was as much bound by the act of his agent in placing the signature there as if done by himself.

The Court of Exchequer were unanimously of opinion that Noakes throughout had acted solely in behalf of the vendor, and that the request of the defendant that the memorandum should be changed from the 19th to the 20th, was to obtain an advantage from the vendor, but in no sense to make Noakes the agent of the purchaser. They therefore made absolute a rule for a nonsuit, for which leave had been reserved at the trial.

The Court of Exchequer Chamber, with equal unanimity, distinguished the case from *Graham v. Musson* (*ante*, p. 185), and held, that there was evidence to go to the jury that Noakes was the agent of the defendant, as well as of the plaintiff, in making the entries; and, if so, that the writing of the defendant's name on the counterfoil was a sufficient signature according to the whole current of authority.

The grounds for distinguishing the case from *Graham v. Musson* were stated by the different judges:—

Crompton, J.: "I cannot agree with my brother Wilde and Mr. Lush that the document in question was merely an invoice, and that all that the defendant did was simply taking an invoice and asking to have it altered: and if the jury had found that, a nonsuit would have been right. But, on the contrary, I think that there was plenty of evidence to go to the jury on the question whether Noakes the agent was to make a record of a binding contract between the parties, and that there was at least some evidence from which the jury might have found in the affirmative." The learned judge then pointed out that the memorandum was in duplicate, one "sold," the other "bought," made in the defendant's presence; that the latter took it, read it, had it altered, and adopted it, all of which facts he considered as evidence for the jury that Noakes was the agent of both parties.

Byles, J.: "What does the defendant do? First of all, he sees a duplicate written by the hand of the agent, and he knows it is a counterpart of that which was binding on the plaintiff. He knew what was delivered out to him was a sale-note in duplicate, and accepts and keeps it. The evidence of what the defendant did, both before and after Noakes had written the memorandum, shows that Noakes was authorised by the defendant."

Blackburn, J.: "The case in the Court below proceeded on what was thrown out by my brother Wilde, and I agree with the decision of that Court, if this document were a bill of parcels, or an invoice in the strict sense, viz., a document which the vendor writes out, not on the account of both parties, but as being the account of the vendor, and not a mutual account. But in the present instance, I cannot as a matter of course look at this instrument as an invoice, a bill of parcels; as intended only on the vendor's account. Perhaps, I should draw the inference that it was, but it is impossible to deny that there was plenty of evidence that the instrument was written out as *the* memorandum by which, and by nothing else, both parties were to be bound. There certainly was evidence, I may say a good deal of

evidence, that Noakes was to alter this writing, not merely as the seller's account, but as a document binding both sides. \* \* \* In *Graham v. Musson*, the name of the defendant, the buyer, did not appear on the document. The signature was that of Dyson, the agent of the seller, put there at the request of Musson, the buyer, in order to bind the seller; and unless the name of Dyson was used as equivalent to Musson, there was no signature by the defendant: but in point of fact, 'J. Dyson' was equivalent to 'for or per pro North & Co., J. Dyson.'"

It will have been observed, that in some of the cases already referred to, it is taken for granted that an auctioneer is an agent for both parties at a *public sale*, for the purpose of signing. This has long been established law.<sup>1</sup> Sir James Mansfield, in *Emmerson v. Heelis*,<sup>1</sup> thus gave the reason for the decisions: "By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots. Therefore, he writes the name by the authority of the purchaser, and he is an agent for the purchaser."

Auctioneer is agent of both parties at a public sale, for signing the note.

It follows from this reasoning that the rule does not apply in a case where the auctioneer sells the goods of his principal at private sale, for then he is the agent of the vendor alone, and in no sense that of the purchaser. And such was accordingly the decision of the Exchequer Court in *Mews v. Carr*.<sup>2</sup>

But of vendor alone at private sale.

And on the same principle it has been held, that the circumstances of the case may be used to rebut the general inference that the auctioneer is agent to sign the name of the highest bidder as purchaser, according to the conditions

His agency for purchaser at public sale may be disproved.

<sup>1</sup> *Hinde v. Whitehouse*, 7 East. 558; *Farebrother v. Simmons*, 5 B. & Ald. 333; *Durrell v. Evans*, 81 L. J. Ex. 337; 1 H. & C. 174.  
*Emmerson v. Heelis*, 2 Taunt. 88; <sup>2</sup> 26 L. J., Ex. 39; 1 H. & C. 484.  
*White v. Proctor*, 4 Taunt. 209; *Kenworthy v. Schofield*, 2 B. & C. 945;  
*Walker v. Constable*, 1 B. & P. 306;

Bartlett v.  
Purnell.

of the sale. Thus, in *Bartlett v. Purnell*,<sup>1</sup> the defendant bought goods at public auction, under an agreement with the plaintiff, who was the executor of the defendant's deceased husband, that the defendant should be at liberty to buy, and that the price should go towards payment of a legacy of 200*l.*, to which the defendant was entitled under the will of the deceased. The conditions of the sale were, that the purchasers were to pay a certain per-centage at the sale, and the rest on delivery. The auctioneer put the defendant's name, like that of all other purchasers, on his catalogue as the highest bidder, and it was contended that he was her agent for that purpose, and that she was therefore bound by the written conditions of the sale. But the Court held, that the real purchase was not a purchase at auction: that the sale was made before the auction, and that the public bidding was only used for the purpose of settling the price at which the purchaser was to take the goods under the antecedent bargain; and that the auctioneer was not the agent of the purchaser. Denman, C. J., saying, "We do not overrule the former cases, but we consider them inapplicable."

Auctioneer's  
agency for  
buyer only be-  
gins when the  
goods are  
knocked down  
to buyer.

But the agency of the auctioneer for the purchaser only begins where the contract is completed by knocking down the hammer. Up to that moment he is the agent of the vendor exclusively. It is only when the bidder has become the purchaser, that the agency arises; and until then the bidder may retract, and the auctioneer may do the same in behalf of the vendor.<sup>2</sup>

Signature by  
an agent as a  
witness.

The signature required by the statute is that of the party to be charged, or his agent. If, therefore, the signature be not that of the agent, *quà* agent, but only in the capacity of witness to the writing, it will not suffice.

Auctioneer's  
clerk.

In *Gosbell v. Archer*,<sup>3</sup> the clerk of the auctioneer, who had authority to act for his master, signed a memorandum of the

<sup>1</sup> 4 Ad. & El. 792.

Warlow v. Harrison, 28 L. J. Q.

B. 18; 1 E. & E. 295.

<sup>2</sup> 2 Ad. & El. 500.

sale, as witness to the signature of the buyer, and an attempt was made to set up the clerk's signature as that of a duly authorised agent of the vendor. The attempt was unsuccessful, and a dictum of Lord Eldon<sup>1</sup> to the contrary was said by Denman, C. J., to be open to much observation. The dictum of Lord Eldon was, that "where a party or principal or person to be bound signs as, *what he cannot be*, a witness, he cannot be understood to sign otherwise than as principal."

Gosbell v.  
Archer.

There is a class of persons who make it their business to act as agents for others in the purchase and sale of goods, known to the common law as brokers. These persons, as a general rule, are agents for both parties, and their signature to the memorandum or note of the agreement is binding on both principals, if the memorandum be otherwise sufficient under the statute.

Brokers.

The authority of a broker to bind his principals may by special agreement be carried to any extent that the principal may choose, but the customary authority of brokers is for the most part so well settled, as to be no longer a question of fact dependent upon evidence of usage, but a constituent part of that branch of the common law known as the law-merchant, or the custom of merchants. There are still, however, some points on which the limits of their authority are not fully determined, and on which evidence of usage would have a controlling influence in deciding on the rights of the parties.<sup>2</sup>

Their general  
authority.

Before entering into an examination of the authorities, it will be convenient to give a short summary of the statutes in relation to brokers in the City of London, as many of the cases turn upon their dealings.

Brokers in city  
of London.

The brokers of London have from very early times been under the control of the corporation of the city. The statutes of 6 Anne c. 16, 10 Anne c. 19, s. 121, and 57 Geo.

<sup>1</sup> In *Coles v. Trecothick*, 9 Ves. 251; and see the observations of Sir Edward Sugden, Vend. and Purch. p. 143.

<sup>2</sup> See, for example, *Dickinson v. Lilwall*, 4 Camp. 279; *Baines v. Ewing*, L. R. 1, Ex. 320; 35 L. J., Ex. 194.

III. c. 60,<sup>1</sup> contain provisions for the regulation of brokers, and for defining the power of the corporation. Under these acts the city has required a bond and an oath, the form of which, prior to the year 1818, may be found given in *Kemble v. Atkins*, 7 Taunt. 260; S. C. Holt, N. P. 431. The regulations imposed, and form of the bond as altered in 1818, are printed at length in the appendix to "Russell on Factors and Brokers." It is imposed as a duty on the broker that he shall "keep a book or register, intituled 'The Broker's Book,' and therein truly and fairly enter all such contracts, bargains, and agreements, on the day of the making thereof, together with the christian and surname at full length of both the buyer and seller, and the quantity and quality of the articles sold or bought, and the price of the same, and the terms of credit agreed upon, and deliver a contract-note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request, respectively containing therein a true copy of such entry; and shall upon demand made by any or either of the parties, buyer or seller, concerned therein, produce and show such entry to them or either of them, to manifest and prove the truth and certainty of such contracts and agreements."

Contract notes.

Mr. Justice Blackburn<sup>2</sup> warns his readers not to confound the contract notes here mentioned, which are a copy of the entry, with the bought and sold notes which are or ought to be made out at the time of making the contract, and generally as soon as, or before it is entered in the book, and he remarks that no mention is made of the bought and sold notes in the bonds or regulations. But Lord Ellenborough expressly says, in *Hinde v. Whitehouse*,<sup>3</sup> and *Heyman v. Neale*,<sup>4</sup> that the bought and sold notes are "transcribed from the book," are "copies of the entry," and this may be found repeated *passim* in the reported cases, although no

<sup>1</sup> These statutes will be found in the notes at p. 426 of vol. i., Chitty's Collection of Statutes, ed. 1865; that of 6 Anne is in the text, at p. 424.

<sup>2</sup> P. 98.

<sup>3</sup> 7 East, 559.

<sup>4</sup> 2 Camp. 337.

doubt these notes are very frequently made in the manner stated by Blackburn, J., as is also apparent in the reported cases.

The brokers in London are bound by the customs of trade just as all other brokers are, and such customs are valid in spite of anything to the contrary in the bonds and regulations which are purely municipal.<sup>1</sup>

Brokers in London bound by customs of trade.

When a broker has succeeded in making a contract, he reduces it to writing, and delivers to each party a copy of the terms as reduced to writing by him. He also ought to enter them in his book, and sign the entry. What he delivers to the seller is called the sold note: to the buyer, the bought note. No particular form is required, and from the cases it seems that there are three varieties used in practice. The first is where on the face of the notes the broker professes to act for both the parties whose names are disclosed in the note. The sold note then, in substance, says, "sold for A. B. to C. D.," and sets out the terms of the bargain: the bought note begins, "Bought for C. D. of A. B.," or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker.

Bought and sold notes.

The second form is where the broker does not disclose in the bought note the name of the vendor, nor in the sold note the name of the purchaser, but still shows that he is acting as broker, not principal. The form then is simply, "Bought for C. D.," and "Sold for A. B."

The third form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving to the buyer a note, "Bought for you by me," he gives it in this form, "Sold to you by me." By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof, that he was only acting as broker for another, although the party to whom he gives such a note is at liberty to shew that there was an un-named principal, and to make this principal responsible (*ante*, pp. 164, 5).

<sup>1</sup> *Ex parte Dyster*, 2 Rose, 348.



According to either of the first two forms, the party who receives and keeps a note, in which the broker tells him in effect, "I have bought for you, or I have sold for you," plainly admits that the broker acted by his authority, and as his agent, and the signature of the broker is therefore the signature of the party accepting and retaining such a note; but according to the third form, the broker says, in effect, "I myself sell to you," and the acceptance of a paper describing the broker as the principal who sells, plainly repels any inference that he is acting as agent for the party who buys, and in the absence of other evidence, the broker's signature would not be that of an agent of the party retaining the note.

These observations (chiefly extracted from "Blackburn on Sale") have a direct bearing on points long in dispute, and some of which are yet vexed questions, as will abundantly appear on a review of the authorities.

Where the bought and sold notes and the entry in the broker's books all correspond, no dispute can arise as to the real terms of the bargain; but it sometimes happens that the bought and sold notes differ from each other, and even that neither corresponds with the entry in the book. It then becomes necessary to determine the legal effect of the variance, and there has not only been great conflict in the decisions of the Courts, but sometimes great change in the opinions of the same judge. As regards the signed entry in the broker's book, it has been held at different times that it did, and that it did not, constitute the contract between the parties; and it has also been held that it was not even admissible in evidence, or, at all events, not without proof that the entry was either seen by the parties when they contracted, or was assented to by them. The most convenient method of reviewing the decisions will be to follow the leading cases in order of time, and then educe the propositions fairly embraced in them.

Entry in broker's book—  
conflict of  
opinion as to  
its effect.

Review of the  
cases.

In 1806 there was this dictum of Lord Ellenborough in *Hinde v. Whitehouse*<sup>1</sup> on the subject: "In all sales made

<sup>1</sup> 7 East, 509.

by brokers acting between the parties buying and selling, *the memorandum in the broker's book and the bought and sold notes transcribed therefrom*, and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute." His Lordship here speaks of bought and sold notes as mere copies of the book, and the inference would be that he considered the book, as the original, to be of more weight than copies from it. Hinde v.  
Whitehouse.

In 1807, he gave this opinion expressly in *Heyman v. Neale*,<sup>1</sup> saying: "After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. *The bought and sold note is not sent on approbation, nor does it constitute the contract.* The entry made and signed by the broker who is the agent of both parties *is alone the binding contract.* What is called the bought and sold note *is only a copy of the other*, which would be valid and binding, although no bought or sold note was ever sent to the vendor and purchaser." In this case the bought and sold notes were sworn by the broker to be copies of the entry in his book, and the buyer had, soon after receiving the bought note, objected and said he would not be bound by it. Heyman v.  
Neale.

In 1810, in *Hodgson v. Davies*,<sup>2</sup> the sale was through a broker who rendered bought and sold notes, showing that payment was to be by bill at two and four months. Five days afterwards the defendant, being called on for delivery of the goods sold, objected to the sufficiency of the plaintiff, and refused to perform the contract. Lord Ellenborough thought at first that the contract concluded by the broker was absolute, *unless his authority was limited by writing of which the purchaser had notice.* But the gentlemen of the special jury said that unless the name of the purchaser has been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract. Lord Ellenborough Hodgson v.  
Davies.

<sup>1</sup> 2 Camp. 337.<sup>2</sup> 2 Camp. 530.

allowed this to be a valid and reasonable usage, but left it to the jury whether the delay of five days in objecting was not unreasonable according to the usual commercial practice, and the jury found that it was.

Thornton v.  
Kempster.

In 1814, the Court of Common Pleas decided the case of *Thornton v. Kempster*<sup>1</sup> (*ante*, p. 170), where the broker's sold note described a sale of St. Petersburg hemp, and the bought note described the goods as Riga Rhine hemp, a different and superior article. The Court considered the case as though no broker had intervened, and the parties had personally exchanged the notes, holding that there never had been any agreement as to the subject-matter of the contract, and therefore no contract at all between the parties.

Cumming v.  
Roebuck.

In 1816, *Cumming v. Roebuck*<sup>2</sup> was tried before Gibbs, C. J., at Nisi Prius, and it appeared that the bought and sold notes differed. The learned Chief Justice said: "If the broker deliver a different note of the contract to each party contracting, there is no valid contract. There is, I believe, a case which states the entry in the broker's book to be the original contract, but it has been since contradicted."

It has been surmised that the case alluded to was that of *Heyman v. Neale*,<sup>3</sup> but no case has been found in the Reports justifying the assertion of the Chief Justice that *Heyman v. Neale* had been contradicted.

In 1826, the subject first came before the full Court in the Queen's Bench in two cases.

Grant v.  
Fletcher.

In the first, *Grant v. Fletcher*,<sup>4</sup> there was a material variance between the bought and sold notes, and the broker had made an unsigned entry in his "memorandum-book," which entry was incomplete, not naming the vendor. The plaintiff was non-suited at the assizes on the ground that there was no valid contract between the parties. Abbott, C. J., delivered the opinion of the Court on the motion for a new trial. "The broker is the agent of both parties, and

<sup>1</sup> 5 Taunt. 786.

<sup>2</sup> Holt, 172.

<sup>3</sup> 2 Camp. 337.

<sup>4</sup> 5 B. & C. 436.

as such, may bind them by signing the *same contract* on behalf of buyer and seller; but if he does not sign the *same contract* for both parties, neither will be bound. \* \* The entry in the broker's book is, *properly speaking, the original, and ought to be signed by him.* The bought and sold notes delivered to the parties *ought to be copies of it.* A valid contract may probably be made by perfect notes signed by the broker, and delivered to the parties, although the book be not signed; but if the notes are imperfect, an unsigned entry in the book will not supply the defect."

In *Goom v. Afalo*,<sup>1</sup> the other case, the decision was *Goom v. Afalo.* express that the bought and sold notes suffice to satisfy the statute, if otherwise unobjectionable, even though the entry in the broker's book be unsigned. The broker in this case made his entry complete in its terms on the 23rd of February as soon as he had concluded the contract, but did not sign it. On the same evening he sent to the parties bought and sold notes signed by him, copied from the entry in his books. Next morning the defendant objected to, and returned the sold note, and refused to deliver the goods. The Court held the contract binding, notwithstanding the absence of signature to the entry in the book, Abbott, C. J., saying, "The entry in the book has been called the original, and the notes copies: but there is not *any actual decision that a valid contract may not be made, by notes duly signed, if the entry be unsigned.* \* \* \* We have no doubt that a broker ought to sign his book, and that every punctual broker will do so. But *if we were to hold such a signature essential to the validity of a contract, we should go further than the Courts have hitherto gone,* and might possibly lay down a rule that would be followed by serious inconvenience, *because we should make the validity of the contract to depend upon some private act, of which neither of the parties to the contract would be informed,* and thereby place it in the power of a negligent or fraudulent man to render the engagements of parties valid or invalid at his pleasure."

Thornton v.  
Meux.

In Thornton v. Meux,<sup>1</sup> in 1827, tried before Chief Justice Abbott, at Guildhall, there was a variance between the bought and sold notes, and plaintiff offered in evidence the entry in the broker's book to show which of the two was correct, but on objection, the evidence was excluded, the Chief Justice saying: "I used to think at one time that the broker's book was the proper evidence of the contract; but I afterwards changed my opinion, and held, conformably to the rest of the Court, that the copies delivered to the parties were the evidence of the contract they entered into, still feeling it to be a duty in the broker to take care that the copies should correspond. I think I must still act upon that opinion, and refuse the evidence."

It will be apparent from the foregoing cases how completely the opinion of the learned Chief Justice had been changed; his view being, *first*, in Grant v. Fletcher, that the book was the original, though *probably*, if the bought and sold notes were perfect, the book might be dispensed with; *secondly*, in Goom v. Aflalo, that the broker's signature in his book was *not essential* to the validity of the contract; and *thirdly*, in Thornton v. Meux, that the signed entry was not even admissible in evidence, and that the bought and sold notes were the *sole* evidence of the contract between the parties.

Hawes v.  
Forster.

Hawes v. Forster<sup>2</sup> was twice tried: first in 1832, and again in 1834. On the first trial, the plaintiff put in the bought note, and proved by the broker that he had made the contract, entered it in his book, signed the entry, and sent the bought and sold notes to the parties on the same evening; but the broker could not tell which was first written, the entry or the notes. Plaintiff closed his evidence without calling for the sold note, and thereupon the defendant moved for non-suit, but Lord Denman held that the plaintiff was not bound to give any evidence of the sold note. The defendant then offered to prove by the broker's book a variance from the bought note put in, contending that the

<sup>1</sup> Moody & M. 43.

<sup>2</sup> 1 Mood. & Rob. 368.

entry was the original contract ; but this was objected to on the authority of *Thornton v. Meux* (*supra*, p. 198), and the evidence was rejected, Lord Denman saying : "I am of opinion that the plaintiffs have proved a contract by producing the bought note. \* \* \* It is not shown that the sold note delivered to the defendants differed from the bought note delivered to the plaintiffs ; had that been the case, it would have been very material. But in the absence of all proof of that nature, I am clearly of opinion that I must look to the bought note, *and to that alone*, as the evidence of the terms of the contract."

The defendants afterwards moved for a non-suit before the Court in Banc, on the ground of the non-production of the sold note, but failed. They also moved for a new trial, on the ground of the exclusion of the broker's book, and succeeded, the Lord Chief Justice saying, "that the Court doubted whether the case involved any point of law at all, and whether it did not rather turn upon the custom, viz., how the broker's book was treated by those who dealt with him." On the second trial, the sold note was produced, and corresponded with the bought note, and proof was given by merchants that the broker's book was never referred to, and that they always looked to the bought and sold notes as the contract. The broker's book showed a material variance from the bought and sold notes, and Lord Denman put the question to the jury "Whether the bought and sold notes constituted the contract, or whether the entry in the broker's book, which in this instance differed from the bought and sold notes, constituted it ?" His Lordship intimated his own opinion to be that in law the note delivered by the broker was the real contract;<sup>1</sup> but said that it had been thought better to take the opinion of the jury as to the usage of trade as a matter of fact, and told them : "If the evidence has satisfied you that, according to the usage of trade, the bought and sold notes are the contract, then you will find a verdict for the plaintiffs." The jury found for the plaintiffs,

<sup>1</sup> See *dictum* of Denman, C. J., also, in *Trueman v. Loder*, 11 Ad. & E. 589.

and the defendants at first indicated the intention of carrying the case to a higher court, but afterwards submitted to the verdict.

Thornton v.  
Charles.

In 1842, the Exchequer Court had the subject, together with the decision in *Hawes v. Forster*, under consideration, in the case of *Thornton v. Charles*.<sup>1</sup> Parke, B., and Lord Abinger held opposite opinions. Parke, B., said: "I apprehend it has never been decided that the note entered by the broker in his book, and signed by him would not be good evidence of the contract so as to satisfy the Statute of Frauds, there being no other. The case of *Hawes v. Forster* underwent much discussion in the Court of King's Bench when I was a member of that Court, and there was some difference of opinion among the judges; but ultimately it went down to a new trial, in order to ascertain whether there was any usage or custom of trade which makes the broker's note evidence of the contract. \* \* \* *Certainly it was the impression of part of the Court that the contract entered in the book was the original contract, and that the bought and sold notes did not constitute the contract.* The jury found that the bought and sold notes were evidence of the contract; but, on the ground that these documents having been delivered to each of the parties after signing the entry in the book, constituted evidence of a *new* contract, made between the parties on the footing of those notes.<sup>2</sup> That case may be perfectly correct, but it does not decide that if the bought and sold notes disagree, or (and?) there be a memorandum in the book made according to the intention of the parties, that memorandum signed by the broker would not be good evidence to satisfy the Statute of Frauds." Lord Abinger said: "I desire it to be understood that I adhere to the opinion given by me, that when the bought and sold notes differ materially from each other, there is no contract, unless it be shown that the broker's book was known to the parties."

Pitts v.  
Beckett.

In *Pitts v. Beckett*,<sup>3</sup> in 1845, the plaintiff, who had wool

<sup>1</sup> 9 M. & W. 802.

same effect, *infra*, p. 205.

<sup>2</sup> See statement of Patteson, J., to

<sup>3</sup> 13 M. & W. 743.

for sale in the hands of a wool-broker, took the defendant to the broker's office, and there sold the wool by sample in the broker's presence, it being part of the bargain that the wool was to be *in good dry condition*. In the afternoon of the same day the broker wrote to the plaintiff: "Dear Sir,—We have this day sold on your account, Messrs. Beckett and Brothers" (here followed a description of the terms) "brokerage, 1 per cent. Hughes and Ronald." A machine copy of this communication was made in the broker's book. The broker did not write at all to the purchasers, nor send them any note of the contract. The note to the plaintiff said nothing about the stipulation that the bulk should be in good dry condition. The defendants rejected the wool when sent to them, on the ground that it was not in good condition, and the jury found this to be true. The evidence offered was the note written to the plaintiff, and the machine copy of it as being the entry in the broker's book. Held, that the authority given to the broker by the defendant was, not to make a bargain for him, but to reduce to writing and sign the bargain actually made; that the broker, therefore, was without authority from the defendant to sign a bargain which omitted one of the material stipulations, viz., that the wool should be in good dry condition; and that the paper offered in evidence against defendants was therefore not signed by them or their agent. The judges also intimated very strongly the opinion, that the broker's signature was not intended by him to represent the buyer's signature, and that the paper was a mere letter of advice, written in his character of agent of the plaintiff, copied by machine into his letter-book, and not intended as one of the bought and sold notes usually delivered by brokers.

Finally, in 1851, the subject was elaborately considered in the Queen's Bench, in the case of *Siewwright v. Archibald*,<sup>1</sup> before Lord Campbell, C. J., and Erle, Patteson, and Wightman, JJ. The case was tried at Guildhall before the Chief Justice, and there was a verdict for the plaintiff,

*Siewwright v.  
Archibald.*

<sup>1</sup> 20 L. J., Q. B. 529; 17 Q. B. 115.



with leave reserved to move to set it aside, and enter a verdict for the defendant. The declaration set out an alleged "sold note," and contained a count for goods bargained and sold. A variance was afterwards discovered between the bought and sold notes, and an amendment alleging the bought note was allowed, on its being stated to the learned Chief Justice that the plaintiff could give evidence of a subsequent ratification of the bought note by the defendant. The sold note was for a sale to the defendant of "500 tons *Messrs. Dunlop, Wilson, & Co.'s* pig iron." The bought note was for "500 tons of *Scotch* pig iron." The broker proved an order from the plaintiff to sell 500 tons of Dunlop, Wilson, & Co.'s iron: that their iron was Scotch iron, and that they were manufacturers of iron in Scotland; and that the agreement with the defendant was, that he purchased from the broker 500 tons of *Dunlop, Wilson, & Co.'s* iron. The name of the sellers was given to the purchaser. The bought and sold notes were complete in every respect, and corresponded, save in the variance between the words "Scotch iron" and "Dunlop, Wilson, & Co.'s iron." *There was no entry in the broker's book signed by him.*

The views of the judges differed so widely, and their observations on every branch of this vexed subject are so important, that it is necessary to transcribe them at considerable length. Lord Campbell's judgment was concurred in entirely by Wightman, J., who heard the argument in April, but was unable to be present at the decision in the following June.

Lord Campbell's opinion.

His Lordship first held, that there was not sufficient evidence to justify the verdict of the jury that the defendant had ratified the contract expressed in the bought note. Next, that there was no parol agreement shown by the evidence, antecedent to the bought note, and of which that bought note could properly be said to be a memorandum, but that *the agreement itself was intended to be in writing, and was understood by the parties to have been reduced to writing when made*: and his Lordship then continued his

reasoning on the supposition that this view was erroneous, and that there had been an antecedent parol agreement, in these words: "Can this (the bought note) be said to be a true memorandum of the agreement? We are here again met by the question of the *variance*, which is as strong between the parol agreement and the bought note, as between the bought note and the sold note. If the bought note can be considered a memorandum of the parol agreement, so may the sold note, and which of them is to prevail? It seems to me, therefore, that we get back to the same point at which we were when the variance was first objected to, and the declaration was amended. I by no means say that where there are bought and sold notes, they must necessarily be the only evidence of the contract: circumstances may be imagined in which they might be used as a memorandum of a parol agreement. Where there has been an entry of the contract by the broker in his book, signed by him, I should hold without hesitation, notwithstanding some dicta and a supposed ruling by Lord Tenterden, in *Thornton v. Meux*, to the contrary, *that this entry is the binding contract between the parties*, and that a mistake made by him when sending a copy of it in the shape of a bought or sold note would not affect its validity. Being authorised by the one to sell and the other to buy in the terms of the contract, when he has reduced it into writing, and signed it as their common agent, it binds them both according to the Statute of Frauds, as if both had signed it with their own hands. The duty of the broker requires him to do so, and until recent times, this duty was scrupulously performed by every broker. What are called the bought and sold notes are sent by him to his principals by way of information that he has acted upon their instructions, *but not as the actual contract which was to be binding on them*. This clearly appears from the practice still followed, of sending the bought note to the buyer and the sold note to the seller, whereas, if these notes had been meant to constitute the contract, the bought note would be put into the hands of the seller, and the sold note into

the hands of the buyer, that each might have the engagement of the other party, and not his own. But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold notes as before. If these agree, they are held to constitute a binding contract; *if there be any material variance between them, they are both nullities, and there is no binding contract.* This last proposition, though combated by the plaintiff's counsel, has been laid down and acted upon in such a long series of cases, that I could not venture to contravene it if I did not assent to it. \* \* \* In the present case, there being a material variance between the bought and sold notes, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient mention of it in writing, nor any part acceptance or part payment, the Statute of Frauds has not been complied with, and I agree with my brother Patteson in thinking that the defendant is entitled to our verdict."

Patteson, J.,  
opinion.

Patteson, J., said that the sole question was whether there was a note or memorandum in writing of the bargain signed by the defendant or his agent, it being quite immaterial whether there was one signed by the plaintiff; that the memorandum need not be the contract itself, but that a contract might be by parol, and if a memorandum were afterwards made, embodying the contract, and signed by one party or his agent, he being the party to be charged, the statute was satisfied. Still, if the original contract was in writing, signed by both parties, *that* would be the binding instrument, and no subsequent memorandum signed by *one* party could have any effect. The learned judge considered that in the case before the Court the contract was not in writing; that it was made by the broker, acting for both parties, but was not signed by him or them, and that the statute therefore could not be satisfied unless there was some *subsequent* memorandum, signed by the defendant or his agent. His Lordship then continued: "There are subsequent memoranda signed by the broker, namely, the

bought and sold notes. Which of these, if either, is the memorandum in writing signed by the defendant or his agent? The bought note is delivered to the buyer, the defendant: the sold note to the seller, the plaintiff. Each of them in the language used purports to be a representation by the broker to the person to whom it is delivered of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract, signed by the buyer's agent, in order that he might be bound thereby, for then it would have been delivered to the seller, not to the buyer, and *vice versa* as to the sold note. Can, then, the sold note delivered to the seller be treated as the memorandum signed by the agent of the buyer, and binding him, the buyer, thereby? The very language shows that it cannot. In the City of London, where this contract was made, the broker is bound to enter in his books and sign all contracts made by him; and if the broker had made such signed entry, *I cannot doubt, notwithstanding the cases and dicta apparently to the contrary, that such memorandum would be the binding contract on both parties.*" The learned judge then went on to say that he had been one of the judges of the Court that granted the new trial in *Hawes v. Forster*, and he confirmed the account given of that case by Parke, B., in *Thornton v. Charles* (*supra*, p. 200). He then continued: "However, in the present case there was no signed memorandum in the broker's book. Therefore, the bought and sold notes together, or one of them, must be the memorandum in writing signed by the defendant's agent, or there is none at all, and the statute will not be satisfied. If the bought and sold notes together be the memorandum, and they differ materially, it is plain that there is no memorandum. The Court cannot possibly say, nor can a jury say, which of them is to prevail over the other. Read together, they are inconsistent; assuming the variance between them to be material, and if one prevails over the other, that one will be the memorandum, and not the two together. If, on the other hand, one only of these notes is

to be considered as the memorandum in writing signed by the defendant's agent, and binding the defendant, which of them is to be so considered, the bought note delivered to the defendant himself, or the sold note delivered to the plaintiff? I have already stated that I cannot think either of them by itself can be so treated. \* \* \* If this were *res integra*, I am strongly disposed to say that I should hold the bought and sold notes together not to be a memorandum to satisfy the Statute of Frauds, but I consider the point to be too well settled to admit of discussion. Yet there is no case in which they have varied, in which the Court has upheld the contract, plainly showing that the two together have been considered to be the memorandum binding both parties, the reason of which is, I confess, to my mind, quite unsatisfactory, but I yield to authority."

Erle, J.,  
opinion.

Erle, J., stated the question raised in the case as follows: "The defendant contends, *first*, that in cases where a contract is made by a broker, and bought and sold notes have been delivered, they alone constitute the contract, that all other evidence of the contract is excluded, and that if they vary a contract is disproved." The learned judge held, that the defendant had failed to establish this proposition, and then observed: "The question of the effect either of an entry in a broker's book signed by him, or of the acceptance of bought and sold notes, which agree, is not touched by the present case. I assume that sufficient parol evidence of a contract in the terms of the bought note delivered to the defendant has been tendered, and *that the point is whether such evidence is inadmissible, because a sold note was delivered to the plaintiff; in other words, whether bought and sold notes, without other evidence of intention, are by presumption of law a contract in writing. I think they are not.* "If bought and sold notes, which agree, are delivered and accepted without objection, such acceptance, without objection, is evidence for the jury of mutual assent to the terms of the notes, but the assent is to be inferred by the jury, from their acceptance of the notes without objection, not from the signature to the writing, which would be the proof,

if they constituted a contract in writing. \* \* \* The form of the instrument is strong to show that they are not intended to constitute a contract in writing, but to give information from the agent to the principal of that which has been done in his behalf. \* \* \* No person acquainted with legal consequences would intend to make a written contract depend on separate instruments, sent at separate times, in various forms, neither party having seen both instruments. Such a process is contrary to the nature of contracting, of which the essence is interchange of consent at a certain time. \* \* \* It seems to me, therefore, that upon principle, *the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree.*" The learned judge then pointed out the distinction between proof of a contract, and proof of a compliance with the statute, saying: "The question of a compliance with the statute does not arise till the contract is in proof. In case of a written contract, the statute has no application. In case of other contracts, the compliance may be proved by part payment or part delivery, or memorandum in writing of the bargain. Where a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing; in that it may be made at any time after the contract, if before the action commenced, and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only, or his agent, and if the terms of the bargain can be collected from it, although it be not expressed in the usual form of an agreement."

His Lordship then held, that upon a review of the evidence in the case, there was sufficient parol proof to show that the bought note was a correct statement of the terms of the bargain, and that defendant had acquiesced in and was satisfied with it.

The case of *Cropper v. Cook*,<sup>1</sup> just reported (H. T., *Cropper v. Cook*).

<sup>1</sup> L. R. 3 C. P. 194; 37 L. J., C. P.

No variance that principals are named in one note and not in the other.

1868), determines that it is not a variance between the bought and sold notes that the bought note shows the names of the two principals, and the sold note states, "Sold to our principals, &c.," without naming the buyers. It was proven in the case that a special usage exists in the wool trade, in Liverpool, that the buyer's broker may contract in the name of the principal, or at his discretion, without disclosing the principal's name, thus making himself personally responsible, if requested to do so by the vendor; and that the broker may do this, without communicating the fact to the buyer. The Court held this usage reasonable and valid.

General propositions deduced from the authorities.

The following propositions are submitted as fairly deducible from the authorities just reviewed, and others quoted in the notes, though some of these points cannot be considered as finally settled.

Broker's signed entry constitutes the contract.

*First.* The broker's signed entry in his book constitutes the contract between the parties, and is binding on both. This proposition rests on the authority of Lord Ellenborough, in *Heyman v. Neale*,<sup>1</sup> of Parke, B., in *Thornton v. Charles*,<sup>2</sup> and of Lord Campbell, C. J., and Wightman and Patteson, JJ., in *Sievwright v. Archibald*.<sup>3</sup>

Gibbs, C. J., in *Cumming v. Roebuck*; <sup>4</sup> Abbott, C. J., in *Thornton v. Meux*; <sup>5</sup> Denman, C. J., in *Townend v. Drakeford*; <sup>6</sup> and Lord Abinger, in *Thornton v. Charles*,<sup>2</sup> are authorities to the contrary, but they seem to have been overruled in *Sievwright v. Archibald*.<sup>3</sup>

The bought and sold notes do not.

*Secondly.*—The bought and sold notes do not constitute the contract. This is the opinion of Parke, B., in *Thornton v. Charles*; <sup>2</sup> of Lord Ellenborough, in *Heyman v. Neale*,<sup>1</sup> and was the unanimous opinion of the four judges in *Sievwright v. Archibald*.<sup>3</sup> The decision to the contrary, in the *Nisi Prius* case of *Thornton v. Meux*,<sup>5</sup> and the *dicta* in *Goom v.*

<sup>1</sup> 2 Camp. 337.

<sup>4</sup> Holt, 172.

<sup>2</sup> 9 M. & W. 802.

<sup>5</sup> M. & M. 43.

<sup>3</sup> 20 L. J., Q. B. 529; 17 Q. B.

<sup>6</sup> 1 Car. & K. 20.

Afalo,<sup>1</sup> and *Trueman v. Loder*,<sup>2</sup> are pointedly disapproved in the case of *Sievwright v. Archibald*.<sup>3</sup>

*Thirdly*.—But the bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute; even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry. This was first settled by *Goom v. Afalo*,<sup>1</sup> and reluctantly admitted to be no longer questionable in *Sievwright v. Archibald*.<sup>3</sup>

But they suffice to satisfy the statute when they correspond.

*Fourthly*.—It seems that either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book. This was the decision in *Hawes v. Forster*,<sup>4</sup> and on this point the authority of the report of that case is not shaken by the observations of Parke, B., in *Thornton v. Charles*,<sup>5</sup> nor of Patteson, J., in *Sievwright v. Archibald*.<sup>3</sup> See, also, the cases collected in the opinion of Erle, J., in *Sievwright v. Archibald*.

Seemly, either note will suffice unless variance shown.

*Fifthly*.—Where one note only is offered in evidence, the defendant has the right to offer the other note or the signed entry in the book to prove a variance. *Hawes v. Forster*<sup>4</sup> is direct authority in relation to the entry in the book, and in all the cases on variance it is taken for granted that the defendant may produce his own bought or sold note to show that it does not correspond with the plaintiff's.

Where plaintiff offers one note defendant may offer the other to show variance.

*Sixthly*.—As to *variance*. This may occur between the bought and sold notes where there is a signed entry, or where there is none. It may also occur when the bought and sold notes correspond, but the signed entry differs from them. If there be a signed entry, it follows from the authorities under the *first* of these propositions, that this entry will in general control the case, because it constitutes the contract, of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain.<sup>6</sup> If,

When there is variance between the signed entry and the bought and sold notes.

<sup>1</sup> 6 B. & C. 117.

<sup>5</sup> 9 M. & W. 802.

<sup>2</sup> 11 Ad. & E. 509.

<sup>6</sup> But see *Gregson v. Ruck*, 4 Q. B.

<sup>3</sup> 20 L. J., Q. B. 529; 17 Q. B. 115. 737.

<sup>4</sup> 1 Mood. & Rob. 368.



however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury whether the acceptance by the parties of the bought and sold notes constitutes evidence of a *new* contract modifying that which was entered in the book. This is the point established by *Hawes v. Forster*<sup>1</sup> according to the explanation of that case first given by Parke, B., in *Thornton v. Charles*,<sup>2</sup> afterwards by Patteson, J., in *Sievwright v. Archibald*,<sup>3</sup> and adopted by the other judges in this last-named case.

Variance between bought and sold notes where there is no signed entry.

*Seventhly.*—If the bought and sold notes vary, and there is no signed entry showing the terms of the bargain in the broker's book, there is no valid contract. This is settled by *Thornton v. Kempster*,<sup>4</sup> *Cumming v. Roebuck*,<sup>5</sup> *Thornton v. Meux*,<sup>6</sup> *Grant v. Fletcher*,<sup>7</sup> *Gregson v. Rucks*,<sup>8</sup> *Cowie v. Remfry*,<sup>9</sup> and *Sievwright v. Archibald*.<sup>3</sup> The only opinion to the contrary is that of Erle, J., in the last-named case. In one case, however, at Nisi Prius, *Rowe v. Osborne*,<sup>10</sup> Lord Ellenborough held the defendant bound by *his own signature* to a bought note delivered to the vendor which did not correspond with the note signed by the broker and sent to the defendant.

Where note signed by party varied from note by broker.

In sale by broker on credit, vendor may retract, if purchaser's name is unsatisfactory.

*Lastly.*—If a sale be made by a broker on credit, and the name of the purchaser has not been previously communicated to the vendor, evidence of usage is admissible to show that the vendor is not finally bound to the bargain until he has had a reasonable time, after receiving the sold note, to inquire into the sufficiency of the purchaser, and to withdraw if he disapproves. This was decided in *Hodgson v. Davies*,<sup>11</sup> and as the special jury spontaneously intervened in that case, and the usage was held good without proof of it, it is not improbable that the custom might now be considered as judicially recognised by that decision, and as requiring no

<sup>1</sup> 1 Mood. & R. 368.

<sup>2</sup> 9 M. & W. 802.

<sup>3</sup> 17 Q. B. 115; 20 L. J., Q. B. 529.

<sup>4</sup> 5 Taunt. 786.

<sup>5</sup> Holt, 172.

<sup>6</sup> 1 M. & M. 43.

<sup>7</sup> 5 B. & C. 436.

<sup>8</sup> 4 Q. B. 747.

<sup>9</sup> 5 Moore, P. C. 249.

<sup>10</sup> 1 Stark, 140.

<sup>11</sup> 2 Camp. 531.

proof,<sup>1</sup> but it would certainly be more prudent to offer evidence of the usage.

A singular point was decided in *Moore v. Campbell*.<sup>2</sup> A broker employed by the plaintiff to purchase hemp made a contract with the defendant, and sent him a sold note. The defendant replied in writing, "I have this day sold through you to Mr. Moore, &c., &c." The terms stated in this letter varied from those in the sold note sent to the defendant. The Court held that these were not bought and sold notes by a broker of both parties, and that the broker was acting for the plaintiff alone. The plaintiff's counsel contended that the defendant's letter was sufficient proof of the contract to bind him, and must be taken to be his own correction of the sold note made by the broker, and binding on him. But the Court held that although this was true if the intention of the parties was that this letter should constitute the contract, yet if the defendant never intended to be bound as seller unless the plaintiff was also bound as buyer, and meant that the plaintiff should also sign a note to bind himself, there would be no valid contract. The case was therefore remanded for the trial of this question of fact by the jury.

Sold note of broker employed by buyer only.

A mere difference in the *language* of the bought and sold notes will not constitute a variance, if the *meaning* be the same, and evidence of mercantile usage is admissible to explain the language and to show that the meanings of the two instruments correspond.<sup>3</sup>

Difference in language no variance, if meaning is the same.

And where the contract made by the broker was one for the exchange or barter of goods, and he wrote out the contract in the shape of bought and sold notes, giving to each party on a single sheet a bought note for the goods he was to receive, and a sold note for the goods he was to deliver, it was held no variance that the day of payment was specified

*Maclean v. Dunn.*

<sup>1</sup> See *Brandao v. Barnett*, 3 C. B. 519, on appeal to H. of L.; S. C. 12 Cl. & Fin. 787, as to the necessity for proving mercantile usages. Also, 1 Smith's L. C. 549, ed. 1867.

<sup>2</sup> 23 L. J., Ex. 310; 10 Ex. 323.

<sup>3</sup> *Bold v. Rayner*, 1 M. & W. 342; and *per Erle, J.*, in *Siewwright v. Archibald*, 20 L. J., Q. B. 529; 17 Q. B. 115.

at the end of both notes on one sheet, and at the end of the bought note only on the other.<sup>1</sup>

Revocation of  
broker's au-  
thority.

The authority of the broker may, of course, like that of any other agent, be revoked by either party before he has signed in behalf of the party so revoking,<sup>2</sup> but after the signature of the duly authorised broker is once affixed to the bargain, the only case in which the party can be allowed to recede appears to be that mentioned *supra*, p. 210, where a credit sale has been made to an unnamed purchaser, in which event custom allows the vendor to retract if on inquiry within reasonable time after being informed of the name he disapproves the sufficiency of the purchaser.

Subsequent  
alteration of  
sold note.

And where a broker had, reluctantly and after urgent persuasion by the vendor, made an addition to the sold note, after both the bought and sold notes had been delivered to the parties and taken away, the vendor's contention that this addition was simply inoperative was overruled, and the Court held that the fraudulent alteration of the note destroyed its effect,<sup>3</sup> so that the vendor could not recover on it.<sup>3</sup>

Broker's clerk.

In *Henderson v. Barnewall*,<sup>4</sup> where the parties contracted in person in presence of the broker's clerk, who had brought them together on the Exchange, and one, in the hearing of the other, dictated to him the terms of the agreement, it was *held* by all the Barons of the Exchequer that the agency of the clerk was *personal*, and that neither an entry of the bargain in the broker's books nor a sale note signed by him would satisfy the statute, because the clerk could not delegate the agency to his employer.

<sup>1</sup> *Maclean v. Dunn*, 4 Bing. 722—4. 127.

<sup>2</sup> *Farmer v. Robinson*, 2 Camp. 339 n.; *Warwick v. Slade*, 3 Camp.

<sup>3</sup> *Powel v. Devit*, 15 East, 29.

<sup>4</sup> 1 Y & J. 387.

## BOOK II.

### EFFECT OF THE CONTRACT IN PASSING PROPERTY.

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#### CHAPTER I.

##### DISTINCTION BETWEEN CONTRACTS EXECUTED AND EXECUTORY.

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AFTER a contract of sale has been formed, the first question which suggests itself is naturally, What is its effect? When does the bargain amount to an actual sale, and when is it a mere executory agreement?

We have already seen<sup>1</sup> that the distinction between the two contracts consists in this, that in a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer, the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the vendor, whereas in the executory agreement, the goods remain the property of the vendor till the contract is executed. In the one case A. sells to B.: in the other, he only promises to sell. In the one case, as B. becomes the owner of the goods themselves, as soon as the contract is completed by mutual assent, if they are lost or destroyed, he is the sufferer. In the other case, as he does not become the owner of the goods, he cannot claim them specifically; he is not the sufferer if they are lost, cannot maintain trover for

Preliminary  
remarks.

<sup>1</sup> *Ante*, p. 3—59.

them, and has at common law no other remedy for breach of the contract, than an action for damages.

Both these contracts being equally legal and valid, it is obvious that whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law. The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, *cadit quæstio*. But parties very frequently fail to express their intentions, or they manifest them so imperfectly as to leave it doubtful what they really mean, and when this is the case, the Courts have applied certain rules of construction, which in most instances furnish conclusive tests for determining the controversy.

When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory agreement. If A. buys from B. ten sheep, to be delivered hereafter, or ten sheep out of a flock of fifty, whether A. is to select them, or B. is to choose which he will deliver, or any other mode of separating the ten sheep from the remainder be agreed on, it is plain that no ten sheep in the flock can have changed owners by the *mere contract*; that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B., and to have become the property of A.

But on the other hand, the goods sold may be specific, as if there be in the case supposed only ten sheep in a flock, and A. agrees to buy them all. In such case, there may remain nothing to be done to the sheep, and the bargain may be for immediate delivery, or it may be that the vendor is to have the right to shear them before delivery, or may be bound to fatten them, or furnish pasture for a certain time before the buyer takes them, or they may be sold at a certain price, by weight, or various other circumstances may occur which leave it doubtful whether the real intention of the parties is that the sale is to take effect after the sheep have been sheared, or fattened, or weighed, as the case may be, or whether the sheep are to become at once the property

of the buyer, subject to the vendor's right to take the wool, or to his obligation to furnish pasturage, or to his duty to weigh them. And difficulties arise in determining such questions, not only because parties fail to manifest their intentions, but because not uncommonly they *have* no definite intentions; because they have not thought of the subject. When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery; but that the contract is only executory when the goods have not been specified, or if when specified, something remains to be done to them by the vendor, either to put them into a deliverable shape, or to ascertain the price. In the former case there is no reason for imputing to the parties any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done. In the latter case, where something is to be done to the goods, it is presumed that they intended to make the transfer of the property dependent upon the performance of the things yet to be done, as a condition precedent. Of course, these presumptions yield to proof of a contrary intent, and it must be repeated that nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery, is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn, in bulk, sold at a certain price per pound, or per bushel.

The authorities which justify these preliminary observations will now be reviewed, thus placing before the reader the means of arriving at an accurate knowledge of this important branch of the law relating to the sale of personal property. They will be considered in five chapters, having reference to cases.

Division of the  
subject.

1. Where the sale is of a specific chattel, unconditionally.

2. Where the chattels are specific, but are sold conditionally.
3. Where the chattels are not specific.
4. Where there is a subsequent appropriation of specific chattels to an executory agreement.
5. Where the *jus disponendi* is reserved.

The effect of obtaining goods by fraud, upon the transfer of the property in them, will be considered in Book III., Ch: 2, On Fraud.

## CHAPTER II.

### SALE OF SPECIFIC CHATTELS, UNCONDITIONALLY.

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SHEPHERD'S Touchstone, p. 224, gives the common law rules as follows: "If one sell me his horse or any other thing for money or other valuable consideration, and, *First*, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money; or, *Secondly*, all; or, *Thirdly*, part of the money is paid in hand; or, *Fourthly*, I give earnest money, albeit it be but a penny, to the seller; or, *Lastly*, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these cases there is a *good bargain and sale of the thing to alter the property thereof*. In the *first* case, I may have an action for the thing, and the seller for his money; in the *second* case, I may sue for and recover the thing bought; in the *third*, I may sue for the thing bought, and the seller for the residue of the money; in the *fourth* case, where earnest is given, we may have reciprocal remedies, one against another; and in the *last* case, the seller may sue for his money."

Common law rules in Shep. Touch.

In Noy's Maxims,<sup>1</sup> the rules are given thus: "In all agreements there must be *quid pro quo presently*, except a

In Noy's Maxima.

<sup>1</sup> pp. 87—9.



day be expressly given for the payment, or else it is *nothing but communication*. \* \* If the bargain be that you shall give me 10*l.* for my horse, and you gave me one penny in earnest, which I accept, *this is a perfect bargain*, you shall have the horse by an action on the case, and I shall have the money by an action of debt. If I say the price of a cow is 4*l.* and you say you will give me 4*l.* and do not pay me presently, you cannot have her afterwards without I will, *for it is no contract*; but if you begin directly to tell your money, if I sell her to another, you shall have your action on the case against me. \* \* If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, *yet the property of the horse is by the bargain in the bargainee or buyer*; but if he presently tender me my money, and I refuse it, he may take the horse, or have an action of detinue, and if the horse die in my stables, between the bargain and delivery, I may have an action of debt for the money, because *by the bargain the property was in the buyer*."

Modern rules the same with one exception.

Consideration for transfer is the promise to pay, not the actual payment of price.

On sale of specific chattels, title vests in buyer immediately.

The rules given by these ancient authors remain substantially the law of England to the present time, with but one exception. The maxim of Noy, that unless the money be paid "presently" there is no sale except a day be *expressly* given for the payment, as exemplified in the supposed case of the sale of the cow, is not the law in modern times. The consideration for the sale may have been, and probably was, in those early days the actual payment of the price, but it has since been held to be the purchaser's obligation to pay the price, where nothing shows a contrary intention. In *Simmons v. Swift*,<sup>1</sup> Bayley, J., said: "Generally, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, *the property passes immediately*, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price." So in *Dixon v. Yates*,<sup>2</sup> Parke, J., said: "I take it to be clear that

<sup>1</sup> 5 B. & C. 862.

<sup>2</sup> 5 Ad. & El. 313 340.

by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. \* \* Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained. But where by the contract itself, *the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel and to pay the stipulated price*, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is *equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.*"

The principles so clearly stated by these two eminent judges are the undoubted law at the present time.<sup>1</sup> Thus in *Tarling v. Baxter*,<sup>1</sup> the defendant agreed to sell to the plaintiff a certain stack of hay for 145*l.*, payable on the ensuing 4th of February, and to be allowed to stand on the premises until the first day of May. This was held to be an immediate, not a prospective sale, although there was also a stipulation that the hay was not to be cut till paid for. Bayley, J., said: "The rule of law is that where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, *the property in the thing sold vests in the vendee.*" This case was followed by one, presenting very similar features, in the Queen's Bench in 1841.<sup>2</sup>

*Tarling v.  
Baxter.*

In *Gilmour v. Supple*,<sup>3</sup> Sir Cresswell Cresswell, in giving

*Gilmour v.  
Supple.*

<sup>1</sup> *Hinde v. Whitehouse*, 7 East, 558; *Chambers v. Miller*, 10 C. B., N. S. 125, 32 L. J., C. P. 30; *Furley v. Tarling v. Baxter*, 6 B. & C. 360; *Martindale v. Smith*, 1 Q. B. 389; *Bates*, 2 H. & C. 200, and 33 L. J., Ex. 43; *Joyce v. Swan*, 17 C. B., N. S. 84. *Gilmour v. Supple*, 11 Moore, P. C. 551; *The Calcutta Company v. De Mattos*, 32 L. J., Q. B. 322; *Wood v. Bell*, 6 E. & B. 355, and 25 L. J., Q. B. 148, and in *Cam. Scacc.* 321;

<sup>2</sup> *Martindale v. Smith*, 1 Q. B. 389; see also, *Chinery v. Vial*, 5 H. & N. 228; and 29 L. J., Ex. 180.

<sup>3</sup> 11 Moore, P. C. 566.

an elaborate judgment of the Privy Council, says: "By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties." And in the *Calcutta Company v. De Mattos*,<sup>1</sup> in 1863, Blackburn, J., pronounced this to be "a very accurate statement of the law."

<sup>1</sup> 32 L. J., Q. B. 322, 323.

## CHAPTER III.

### SALE OF SPECIFIC CHATTELS, CONDITIONALLY.

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Two rules on this subject are stated by Blackburn, J.,<sup>1</sup> as follows:—

*First.*—Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circumstances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.

*Secondly.*—Where anything remains to be done to the goods, for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition pre-

Two rules on this subject given by Blackburn, J.

Where vendor is to do anything to goods before delivery, property does not pass.

Where goods are to be tested, weighed, or measured, property does not pass.

<sup>1</sup> On Sales, p. 151-2.

cedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.

*Third Rule.*—To these may be added, *Thirdly*—Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.

The authorities in support of these propositions will now be considered.

Hanson v.  
Meyer.

In *Hanson v. Meyer*,<sup>1</sup> the defendant sold a parcel of starch, at 6*l.* per cwt., and directed the warehouseman to weigh and deliver it. Part was weighed and delivered, and then the purchaser became bankrupt, whereupon the vendor countermanded the order for delivery of the remainder, and took it away. In an action for trover, brought by the assignees of the bankrupt purchaser, Lord Ellenborough said, that the act of weighing was in the nature of a condition precedent to the passing of the property by the terms of the contract, because “the price is made to depend upon the weight.”

Rugg v. Minett.

In *Rugg v. Minett*,<sup>2</sup> a quantity of turpentine, in casks, was put up at auction, in twenty-seven lots. By the terms of the sale, twenty-five lots were to be filled up by the vendors, out of the turpentine in the other two lots, so that the twenty-five lots would each contain a certain specified quantity, and the last two lots were then to be measured and paid for. The plaintiff bought the last two lots, and twenty-two of the others. The three lots sold to other parties had been filled up and taken away, and nearly all of those bought by plaintiff had been filled up, but a few remained unfilled, and the last two lots had not been measured, when a fire occurred and consumed the goods. The buyer sued to recover back a sum of money paid by him on account of his purchase. The Court held, that the property had passed

<sup>1</sup> 6 East, 614.

<sup>2</sup> 11 East, 210.

in those lots only which had been filled up, because, as Lord Ellenborough said: "Everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state." And Bayley, J., said, that it was incumbent on the buyer "to make out that something remained to be done to the goods by the sellers at the time when the loss happened."

In *Zagury v. Furnell*,<sup>1</sup> the property was held not to have passed, in a sale of "289 bales of goat skins, from Mogadore, per Commerce, containing five dozen in each bale, at the rate of 57s. 6d. per doz.," because, by the usage of trade, it was the seller's duty to count the bales over, to see whether each bale contained the number specified in the contract, and this had not been done when the goods were destroyed by fire. This was a decision of Lord Ellenborough, at Nisi Prius, and the reporter states that after the plaintiff's nonsuit, he brought another action in the Common Pleas, and was again non-suited by Sir James Mansfield, C. J., who concurred in opinion with Lord Ellenborough.

*Zagury v.  
Furnell.*

In *Simmons v. Swift*,<sup>2</sup> the sale was of a specified stack of bark, at 9l. 5s. per ton, and a part was weighed and taken away, and paid for. Bayley, J., and the majority of the Court held, that the property had not passed in the unweighed residue, although the specific thing was ascertained, because it was to be weighed, "and the concurrence of the seller in the act of weighing was necessary."

*Simmons v.  
Swift.*

In *Logan v. Le Mesurier*,<sup>3</sup> the sale was on the 3rd of December, 1834, of a quantity of red-pine timber, then lying above the rapids, Ottawa River, stated to consist of 1891 pieces, measuring 50,000 feet, more or less, to be delivered at a certain boom in Quebec, on or before the 15th of June then next, and to be paid for by the purchasers' notes at

*Logan v. Le Mc-  
surier.*

<sup>1</sup> 2 Camp. 240.

<sup>2</sup> 5 B. & C. 857.

<sup>3</sup> 6 Moore, P.C. 116. See, also, *Wallace v. Breeds*, 13 East, 522; *Busk v. Davis*, 2 M. & S. 397; *Austen v.*

*Craven*, 4 Taunt. 644; *Shepley v. Davis*, 5 Taunt. 617; *Withers v. Lyas*, 4 Camp. 237; *Boswell v. Kilburn*, 15 Moore, P. C. 309.

ninety days from the date of sale, at the rate of  $9\frac{1}{2}d.$  per foot, measured off. If the quantity turned out more than 50,000 feet, the purchasers were to pay for the surplus, on delivery, at  $9\frac{1}{2}d.$ , and if it fell short, the difference was to be refunded by the sellers. The purchasers paid for 50,000 feet, before delivery, according to the contract. The timber did not arrive in Quebec till after the day prescribed in the contract, and when it did arrive, the raft was broken up by a storm, and a great part of the timber lost, before it was measured and delivered. Held, that the property was not transferred until measured, and that the purchasers could recover back the price paid for all timber not received, and damages for breach of contract.

Gilmour v.  
Supple.

In Gilmour v. Supple,<sup>1</sup> where the facts were identical with the preceding, as regards the sale of a raft of timber, which was broken up by a storm, the words of the contract were, "Sold Allan, Gilmour, and Co., a raft of timber, now at Carouge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian Cove booms. Price for the whole,  $7\frac{3}{4}d.$  per foot." The raft *was delivered* to the buyer's servant, at the appointed place, and broken up by a storm the same night. The Court held, in this case, that the property had passed, because it was proven that the raft *had been measured before delivery*, by a public officer, and it was not to be *measured again by the vendor*. The buyer was at liberty to measure it for his own satisfaction, as in *Swanwick v. Sothern*,<sup>2</sup> but the vendor had lost all claim on the timber, and all lien for price, and there was nothing further for him to do either alone, or concurrently with the purchaser.

Goods measured  
for buyer's satis-  
faction only.

Acraman v.  
Morris.

In Acraman v. Morris,<sup>3</sup> the defendant had contracted for the purchase of the trunks of certain oak trees from one Swift. The course of trade between the parties was, that after the trees were felled, the purchaser measured and marked the portions that he wanted. Swift was then to cut off the rejected parts, and deliver the trunks at his own

<sup>1</sup> 11 Moore, P. C. 551.

<sup>2</sup> 9 Ad. & El. 895.

<sup>3</sup> 8 C. B. 449.

expense, conveying them from Monmouth to Chepstow. The timber in controversy had been bought, measured, and paid for, but the rejected portions had not yet been severed by Swift, when he became bankrupt, and the felled trees then lay on his premises. Defendant afterwards had the rejected portions severed by his own men, and carried away the trunks for which he had paid. Action in trover, by the assignees of bankrupt. Held, property had not passed to buyer, Wilde, C. J., saying, that "several things remained to be done by the seller \* \* \* it was his duty to sever the selected parts from the rest, and convey them to Chepstow, and deliver them at the purchaser's wharf."

But in *Tansley v. Turner*,<sup>1</sup> the sale by the plaintiff was as follows:—"1833. Dec. 26. Bargained and sold Mr. George Jenkins all the ash on the land belonging to John Buckley, Esq., at the price per foot cube, say 1s. 7½d. Payment on or before 29 Sept., 1834. The above Geo. Jenkins to have power to convert on the land. The timber is now felled;" and some trees were measured and taken away the same day. The remaining trees were marked and measured some time afterwards, and the number of cubic feet in the several trees was taken, and the figures put down on paper by the plaintiff's servant, but the whole was not then added up, and the plaintiff said he would make out the statement and send it to Jenkins. This was not done, but it was held that the property had passed, nothing remaining to be done by the vendor to the thing sold. *Tansley v. Turner.*

*Cooper v. Bill*<sup>2</sup> was very similar to the above case in the facts, and was decided in the same way, *Tansley v. Turner*, however, not being cited by the counsel or the Court. *Cooper v. Bill.*

A statement is made by the learned editors of Smith's *Leading Cases*, Vol. I., p. 148, that "it was held in a modern case in the Court of Exchequer (which seems not to have been reported) that the property in a specified chattel bought in a shop to be paid for upon being sent home did not pass before delivery:" and in accordance with *Goods sold to be paid for on delivery at a particular place.*

<sup>1</sup> 2 Scott, 238; 2 Bing., N. C. 151.    <sup>2</sup> 34 L. J., Ex. 161; 3 H. & C. 722.



this is the *dictum* of Cockburn, C. J., in the *Calcutta Company v. De Mattos*,<sup>1</sup> that "if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that *the thing sold was to be in the mean time at the risk of the buyer*, the contract is not fulfilled by the seller unless he delivers it accordingly."

In both these instances, as in *Acraman v. Morris*,<sup>2</sup> something remained to be done by the seller to the thing sold in order to make the agreement an executed contract.

Langton v.  
Higgins.  
Goods put in  
buyer's pack-  
ages.

In *Langton v. Higgins*,<sup>3</sup> it was held that where the buyer had purchased in advance *all* the crop of peppermint oil to be raised and manufactured by a farmer, the property passed to the buyer in all the oil which had been put by the farmer into the buyer's bottles and weighed, although never delivered to him.

Where some-  
thing is to be  
done to the  
goods by vendor  
after delivery.

But the property in goods will pass, even though something remain to be done by the vendor in relation to the goods sold, *after their delivery to the vendee*. Thus where by the custom of the trade if the goods sold continued to lie at the wharf after the sale, the vendor was bound to pay for the warehousing during fourteen days: *held*, that this did not prevent the property from passing from the moment of the delivery.<sup>4</sup> And the same point was held in *Greaves v. Hepke*,<sup>5</sup> where by the usage at Liverpool the vendor was bound to pay warehouse rent for two months after the sale, and the goods were distrained during that interval for rent due by the warehouseman to his lessor. This risk, it was decided, must be borne by the purchaser.

The decision would no doubt be the same in other familiar cases, as if a vendor should engage to keep in good order for a certain time after the sale a watch or clock sold: or to do certain repairs to a ship after the sale and delivery.

Turley v. Bates.  
Where some-

In the recent case of *Turley v. Bates*<sup>6</sup> (also reported *sub*

<sup>1</sup> 32 L. J., Q. B. 322, 355.

N. R. 69.

<sup>2</sup> 8 C. B. 449; 19 L. J., C. P. 57.

<sup>3</sup> 2 B. & A. 131.

<sup>4</sup> 28 L. J., Ex. 252; 4 H. & N. 402.

<sup>5</sup> 2 H. & C. 200.

<sup>6</sup> *Hammond v. Anderson*, 1 B. & P.,

*nom.* *Furley v. Bates*<sup>1</sup>), the jury found that the bargain between the parties was for an entire heap of fire-clay, at 2s. per ton. The buyer was, at his own expense, to load and cart it away, and to have it weighed at a certain machine which his carts would pass on their way when carrying off the clay. All the authorities were reviewed by the Court, and it was held that the property had passed by the contract, great doubt being expressed whether the general rule could be made to extend to cases where something remains to be done to the goods, *not by the seller, but by the buyer*. Without determining this point, the conclusion was drawn that from the terms of the contract as established by the verdict of the jury, the intention of the parties was that the property should pass, and this was what the Court must look to, in every case.<sup>2</sup>

thing is to be done to the goods by the buyer.

In *Kershaw v. Ogden*,<sup>3</sup> the facts as found by the jury were that the defendants purchased four specific stacks of cotton waste, at 1s. 9d. per lb., the defendants to send their own packer and sacks and cart to remove it. The defendants sent their packer with eighty-one sacks, and he, aided by plaintiff's men, packed the four stacks into the eighty-one sacks. Two days afterwards twenty-one of the sacks were weighed and taken to defendants' premises. The rest were not weighed. The same day the twenty-one sacks were returned by the defendants, who objected to the quality. The cart loaded with the waste was left at the plaintiff's warehouse, and he put the waste into the warehouse to prevent its spoiling. *Held*, in an action on counts for not accepting, and for goods bargained and sold, and goods sold and delivered, that the plaintiffs were entitled to recover, Pollock, C. B., saying the case was not distinguishable in principle from *Furley v. Bates*, and *Martin, B.*, saying that on the finding "the property in the four stacks *became the property of the buyers*, and the plaintiff became entitled to the price in an action for goods *bargained and sold*." This

*Kershaw v. Ogden.*

<sup>1</sup> 33 L. J., Ex. 43.

<sup>2</sup> 7 East, 558.

<sup>3</sup> *Logan v. Le Mesurier*, 6 Moore, 384 L. J., Ex. 159, and 3 H. & C. P. C. 116, and *Hinde v. Whitehouse*, 717.

*dictum* was not necessary to the decision, because there was a special count for non-accepting, under which the recovery could be supported, even if the contract was executory. The *dicta* of the two learned Barons in this case may, perhaps, be reconciled with the decision in *Simmons v. Swift*,<sup>1</sup> on the ground that the purchasers, by their return of the sacks weighed, and refusal to take any, had waived the condition that the remainder should be weighed by the vendor.

Young v.  
Matthews.

In *Young v. Matthews*,<sup>2</sup> a purchaser of 1,800,000 bricks sent his agent to the vendor's brick-field to take delivery, and the vendor's foreman said that the bricks were under distraint for rent, but if the man in possession were paid out, he would be ready to deliver the bricks; and he pointed out three clumps *from which* he should make the delivery, of which one was of finished bricks, the second of bricks still burning, and the third of bricks moulded, but not burnt. The buyer's agent then said: "Do I clearly understand that you are prepared and will hold and deliver this said quantity of bricks?" to which the answer was, "Yes." This was held a sufficient appropriation to pass the property, although the bricks were neither finished nor counted out; the Court, however, laying stress on some other circumstances to show that this was the intention of the parties. This case is only reconcileable with the authorities on the ground that as *matter of fact*, the proof showed an intention of the parties to take the case out of the general rule.

Where the  
chattel is un-  
finished or in-  
complete.

Another class of cases illustrative of the rules now under consideration, are those in which the subject of the contract is an unfinished or incomplete thing, a chattel not in a deliverable state, as a partly built carriage or ship. Leaving out of view the cases<sup>3</sup> where no specific chattel has been appropriated (to be considered *post*, Ch. V., p. 268), it will be found that the Courts have held it necessary to

<sup>1</sup> 5 B. & C. 857, *ante*, 223.

<sup>2</sup> L. R. 2, C. P. 127; 37 L. J., C. P.

<sup>3</sup> *Mucklow v. Mangles*, 1 Taunt.

218; *Bishop v. Crawshaw*, 3 B. & C.

418; *Atkinson v. Bell*, 8 B. & C.

277.

show an express intention in the parties that the property should pass in a specific chattel unfinished at the time of the contract of sale, in order to take the case out of the general rule that governs where goods are not in a deliverable state.

Property does not pass unless contrary intention be shown.

In the case of *Woods v. Russell*,<sup>1</sup> decided in 1822, the ship-builder had contracted with defendant to build a ship for him and to complete her in April, 1819; the defendant was to pay for her by four instalments, the first when the keel was laid, the second when at the light plank, and the third and fourth when the ship was launched; the ship was measured *with the builder's privity*, while yet unfinished, *in order that defendant might get her registered in his name*; the builder signed the certificate necessary for her registry, and the ship was registered in defendant's name on the 26th of June, and he paid the third instalment. On the 30th the builder committed an act of bankruptcy, and on the 2nd of July the ship was taken possession of by the defendant before she was completed. The defendant had also in the previous March appointed a master, who superintended the building, had advertised her for charter in May, and on the 16th of June had chartered her, *with the ship-builder's privity*, for a voyage. An action in trover was brought by the assignees of the bankrupt, and it was held that the property had passed, "because the ship-builder signed the certificate to enable the defendant to have the ship registered in the defendant's name, and by that act consented, as it seems to us, that the general property in the ship should be considered *from that time* as being in the defendant." It is thus clearly intimated, that in the absence of some special evidence of intention, the property would have remained in the builder.

*Woods v. Russell.*

In *Clarke v. Spence*,<sup>2</sup> the defendants were the assignees of a bankrupt ship-builder named Brunton. In February, 1832, Brunton had agreed to build a ship (not the one in question in the action) for the plaintiff, according to certain

*Clarke v. Spence.*

<sup>1</sup> 5 B. & Ald. 942.

Fairbanks, 13 C. B. 692, 22 L. J., C.

<sup>2</sup> 4 A. & E. 448. See, also, *Read v.* P. 206.

specifications, under the superintendence of an agent appointed by plaintiff, for 9250*l.* payable as follows: 400*l.* when the ship was rammed, 400*l.* when timbered, 400*l.* when decked, 500*l.* when launched, the residue, 1500*l.*, half at four and half at six months. In July he agreed to build another vessel, of specified dimensions, for 8400*l.*, to be finished like the previous ship, and "the vessel to be launched in the month of December next, and to be paid for in the same way" as the first vessel, "Mr. Howard (plaintiff's agent) to superintend the building and to be paid 40*l.* for the same." Brunton proceeded to build the vessel, and before his bankruptcy she was rammed and timbered, and two instalments paid accordingly. 200*l.* were also paid by anticipation on account of the third instalment. When Brunton became bankrupt, 1002*l.* 11*s.* had been paid him on account, and the frame of the vessel was then worth 1601*l.* 13*s.* 7*d.*, that being the value of the timber and work done on her. The case was elaborately argued in November, 1885, and held under advisement till the ensuing February, when Williams, J., delivered the judgment. Much stress had been laid, in argument, on a passage in the opinion delivered by Bayley, J., in *Atkinson v. Bell*,<sup>1</sup> in which he said that "the foundation of the decision in *Woods v. Russell*<sup>2</sup> was, that as by the contract, given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price, *the ship was irrevocably appropriated to the person paying the money*; that was a purchase of the specific articles of which the ship was made." In commenting upon this *dictum*, Williams, J., showed that in *Woods v. Russell*<sup>2</sup> the decision did not turn upon any such point, although there were extra-judicial expressions strongly tending to that view, and he continued: "If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, of itself vests the property in the person who gives the order, the propo-

<sup>1</sup> 8 B. & C. 277, 282.

<sup>2</sup> 5 B. & Ald. 912.

sition in so general a form may be doubtful. \* \* Until the last of the necessary materials be added, the vessel is not complete; the thing contracted for is not in existence; for the contract is for a complete vessel, not for parts of a vessel, and we have not been able to find any authority for saying that while the thing contracted for is not in existence as a whole and is incomplete, the general property in such parts of it as are from time to time constructed, shall vest in the purchaser, except the above passage in the case of *Woods v. Russell*."

The Court, however, held, that the passage cited from *Woods v. Russell*, was "founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that on payment of the first instalment, the general property in so much of the vessel as is then constructed shall vest in the purchaser." The Court, with the intimation of a wish that the intention of the parties had been expressed in less ambiguous terms, deliberately adopted this *dictum* from *Woods v. Russell*, as a *rule of construction* by which, in similar ship-building contracts, the parties are held to have by implication evinced *an intention that the property shall pass*, notwithstanding the general rule to the contrary. The law thus established has remained unshaken to the present time.

Where contract for building a ship provides for payment by instalments.

The next case was *Laidler v. Burlinson*,<sup>1</sup> in the Exchequer, in 1837, in which the Court recognised the authority of *Woods v. Russell*, and *Clarke v. Spence*, but held those cases not applicable to the contract before it. A ship-builder having a vessel in his yard about one-third completed, a paper was drawn up describing her build and materials, ending with the words, "for the sum of 1750*l.*, and payment as follows, opposite to each respective name." This was signed by James Laing,

*Laidler v. Burlinson.*

<sup>1</sup> 2 M. & W. 602.

the ship-builder. Then followed these words: "We, the undersigned, hereby engage to take shares in the before-mentioned vessel, as set opposite to our respective names, and also the mode of payment." This was signed by seven parties, four of whom set down the modes of payment opposite their names, but the other three did not, the plaintiff being one of the latter, and signing, simply, "Thomas Laidler, one-fourth." The whole number of shares was not made up till after the ship-builder had committed an act of bankruptcy. The plaintiff proved some payments made on account, and the ship-builder became a bankrupt while the vessel was still unfinished. *Held*, that there was nothing in this contract to show an intention to vest the property before the ship was completed. Lord Abinger also said: "There is no occasion to qualify the doctrine laid down in *Woods v. Russell*, or *Clarke v. Spence*. I consider the principle which those cases establish to be, *that a man may purchase a ship as it is in progress of building*, and by the terms employed there, the contract was of that character; a superintendent was appointed, and money paid at particular stages. The Court held, that that was evidence of an intention to become the purchaser of the particular ship, and that the payment of the first instalment vested the property in the purchasers. Suppose the builder had died after the first instalment was paid, the ship in its then state would have become the property of the purchaser, and not of the executor. A party may agree to purchase a ship when finished, or as she stands." Parke, B., said: "If a man bargain for a specific chattel, though it is not delivered, the property passes, and an action lies for the non-delivery, or of trover (*Langfort v. Tiler*, 1 Salk. 113). But it is equally clear that a chattel which is to be delivered *in futuro* does not pass *by the contract*. \* \* \* Is this a contract for an article to be finished? In that case, the article must be finished before the property vests."

*Wood v. Bell*

In *Wood v. Bell*,<sup>1</sup> in 1856, the plaintiffs contracted with

<sup>1</sup> 5 E. & B. 772, and 25 L. J., Q. B. B. 355, and 25 L. J., Q. B. 321. 148, and S. C. in Cam. Scacc. 6 E. &

Joyce, a ship-builder, for a steamer to be built by the latter for 16,000*l.* The contract was in March, 1854, and the price was payable, 4000*l.*, in four equal parts, on days named in March, April, May, and June; 8000*l.* on the 10th August, 1854, "providing the vessel is plated and decks laid;" 8000*l.* on the 10th October, "providing the vessel is ready for trial;" 8000*l.* on the 10th January, 1855, "providing the vessel is according to contract, and properly completed;" and 8000*l.* on the 10th March, 1855, or by bill of exchange, dated 10th January. The building was begun in March, and continued till December, 1854, when Joyce became bankrupt. The ship was then on the slip in frame, not decked, and about two-thirds plated. The instalments contracted for were paid by the plaintiff, in advance. The plaintiff had a superintendent, who supervised the building, objected to materials, and ordered alterations, which were submitted to by Joyce. In July, the plaintiff ordered his name to be punched on the keel, in order to secure the vessel to himself, and this object was known to Joyce, and he consented that this should be done, but it was delayed, because the keel was not sufficiently advanced, till October, and then the plaintiff's name was, at his own instance, punched on a plate riveted to the keel of the ship. It also appeared that in November the plaintiff urged Joyce to execute an assignment of the ship, but the latter objected on the ground "that he would be thereby signing himself and his creditors out of every thing he possessed;" but during the discussion he admitted that the ship was the property of the plaintiff. On these facts, the Court of Queen's Bench, and the Exchequer Chamber, on writ of error, held that the property in the vessel had passed to the plaintiff, Lord Campbell saying, when giving the judgment of the Court, that the terms which made the payments dependent on the vessel's being built to certain specific stages on the days appointed, were "as an indication of intention, substantially the same as if the days had not been fixed, but the payments made to be due expressly when those stages had been reached." The case was determined



mainly on the authority of *Woods v. Russell*,<sup>1</sup> and *Clarke v. Spence*.<sup>2</sup>

When property passes in materials provided for completing unfinished chattel.

It is necessary now to revert to this series of decisions on another point, namely, the effect of such contracts in passing property in the *materials* provided and the *parts prepared* for executing them, but not yet affixed to the ship or vessel.

*Woods v. Russell*.

In *Woods v. Russell*,<sup>1</sup> the builder became bankrupt on the 30th June, and on the 2nd July, the purchaser of the ship took from the builder's yard and warehouse, a rudder and cordage, "which the builder had bought for the ship." All that the Court said, was: "As to the rudder and cordage, as they were bought by Paton specifically for this ship, though they were not actually attached to it at the time his act of bankruptcy was committed, they seem to us to stand on the same footing as the ship; and that if the defendant was entitled to take the ship, he was also entitled to take the rudder and cordage as parts thereof." This point did not arise in *Clarke v. Spence*, but in 1839 *Tripp v. Armistage*,<sup>3</sup> was decided in the Exchequer. In that case there was a contract for building a hotel, and certain sash frames intended for the building were sent to it, examined, and approved by the superintendent, who then sent the frames back to the builder's shop, together with some iron pulleys, belonging to the hotel owners, with directions to fit the pulleys into the sashes. This was done, but before the sashes, with the pulleys affixed, were taken away, the builders became bankrupt. The Court held, that the property in the frames had not passed out of the builder. Lord Abinger put it on the ground, "that there had been no contract for the sale and purchase of goods as moveable chattels, but a contract to make up materials and fix them, and until they are fixed, by the nature of the contract the property will not pass."<sup>4</sup> His Lordship put as a test, that if the sashes had been destroyed by fire, the builder would have lost them, for the hotel owners were *not bound to pay*

*Tripp v. Armistage*.

<sup>1</sup> 5 B. & Ald. 942.

<sup>2</sup> 4 Ad. & E. 468.

<sup>3</sup> 4 M. & W. 687.

<sup>4</sup> See *ante*, p. 82.

*for anything till put up and fixed.* Parke, B. said, also :  
 "In this case there is no contract at all with respect to these particular chattels: *it is merely parcel of a larger contract.*"

In *Goss v. Quinton*,<sup>1</sup> in 1842, an unfinished ship, which the builder had contracted to deliver, was conveyed to the purchaser and registered in his name, but the rudder intended for the ship remained in the builder's yard, incomplete, when he became bankrupt. The Court held that proof that the builder *intended* the rudder for the ship, coupled with proof of the buyer's approval of this purpose, *though not given till after the bankruptcy*, was evidence for the jury that the rudder was part of the ship, and the right of property would be governed by the same considerations as would apply to the body of the ship. But this decision is much questioned, as will presently appear, and could not have been made if the test suggested by Lord Abinger in *Tripp v. Armitage* had been applied; for it is manifest that the incomplete rudder in the builder's yard was at his own risk, and if he had remained solvent there would have been no pretext, in case of its destruction by fire, to call on the ship-owner to supply another rudder at his own expense.

*Goss v. Quinton.*

In *Wood v. Bell*,<sup>2</sup> the contest turned upon valuable materials as well as upon the frame of the ship, and the decision of the Queen's Bench on this part of the case was reversed in *Cam. Scacc.* The facts were, that steam-engines were designed for the ship, and several parts which had been made so as to fit each other, forming a considerable portion of a pair of steam engines, were spoken of constantly by the builder, before his bankruptcy, as belonging to the "*Britannia*" engines, that being the name of the ship. There was also a quantity of iron plates and iron angles specially made and prepared to be riveted to the ship, lying partly at her wharf and partly elsewhere, as well as other materials in like condition, intended, manufactured

*Wood v. Bell.*

<sup>1</sup> 3 M. & G. 825.

25 L. J., Q. B. 148, 321.

<sup>2</sup> 5 E. & B. 772; 6 E. & B. 355;

and prepared expressly for the ship, but not yet fixed or attached to her. The Queen's Bench, after holding that the property in the ship had passed, simply added, "and if this be so, it was scarcely contended but that the same decision ought to be come to with respect to the engines, plates, irons, and planking, designed and in course of preparation for her, and intended to be fixed in her. The question as to these last seems to be governed by the decision as to the rudder and cordage in *Woods v. Russell*." But in the Exchequer Chamber<sup>1</sup> the decision was reversed, Jervis, C. J., giving the judgment of the Court, composed of himself, Pollock, C. B., Alderson and Bramwell, BB., and Cresswell, Crowder, and Willes, JJ. It was held that it did not at all follow because the ship as constructed from time to time became the property of the party paying for her construction, that therefore the materials destined to form a part of the ship also passed by the contract. The Chief Justice said: "The question is, What is the contract? The contract is for the purchase of a ship, not for the purchase of everything in use for the making of the ship. I agree that *those things which have been fitted to and formed part of the ship would pass, even though at the moment they were not attached to the vessel*. But I do not think that those things which had merely been bought for the ship and intended for it would pass to the plaintiff. *Nothing that has not gone through the ordeal of being approved as part of the ship, passes, in my opinion, under the contract.*" The other judges concurred, and the case was sent back to the arbitrator for a new award on these principles, which must now be taken to be the settled law on the point under consideration.<sup>2</sup>

*Woods v. Russell*  
and *Goss v.*  
*Quinton*  
doubted on this  
point.

In the opinion delivered by Jervis, C. J., *Woods v. Russell* was doubted on the question of the rudder and cordage, and *Goss v. Quinton* was not only doubted by the learned Chief Justice, but was unfavourably mentioned by other judges during the argument. Cresswell, J., also

<sup>1</sup> 6 E. & B. 355, and 25 L. J., Q. B. 321.

<sup>2</sup> See *Baker v. Gray*, 17 C. B. 462 ; 25 L. J., C. P. 161.

said: "I am not now better satisfied with the ruling respecting the rudder and cordage in *Woods v. Russell* than I was years ago."

Upon the third proposition stated at the beginning of this chapter, the reported case most directly in point is *Bishop v. Shillito*.<sup>1</sup> It was trover for iron that was to be delivered under a contract, which stipulated that certain bills of the plaintiff then outstanding were to be taken out of circulation. The defendant failed to comply with his promise after the iron had been in part delivered, and the plaintiff thereupon stopped delivery and brought *trover* for what had been delivered. Abbott, C. J., left it to the jury to say whether the delivery of the iron and the re-delivery of the bills were to be contemporary, and the jury found in the affirmative. Scarlett contended that trover would not lie; that the only remedy was case for breach of contract. Held, on the facts as found by the jury, that the delivery was conditional only, and the condition being broken, trover would lie. Bayley, J., added: "If a tradesman sold goods, to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser."

Authorities for third rule.

*Bishop v. Shillito*.

The principle of this decision is fully recognised by the judges in *Brandt v. Bowlby*,<sup>2</sup> when holding that the property in a cargo ordered by one Berkeley did not pass to him because by the terms of the bargain he was to accept bills for the price as a condition concurrent with the delivery, and had refused to perform this condition.<sup>3</sup> So in *Swain v. Shepherd*<sup>4</sup> it was held by Parke, B., that if goods are sent on an order, to be returned if not approved, the property remains in the vendor till approval.

*Brandt v. Bowlby*.

*Swain v. Shepherd*.

To the same effect was the judgment of Lord Ellenborough in *Barrow v. Coles*.<sup>5</sup> This was trover for 100 bags of coffee shipped by Norton and Fitzgerald of Demerara.

*Barrow v. Coles*.

<sup>1</sup> 2 B. & A. 329, note (a).

47 u, note.

<sup>2</sup> 2 B. & Ad. 532.

<sup>4</sup> 1 Mood & Rob. 223.

<sup>3</sup> See, also, 2 Williams' Saunders

<sup>5</sup> 3 Camp. 92.

They drew for the value upon one Voss, in favour of Barrow the plaintiff, and sent to the latter the bill of lading attached to the bill of exchange. The bill of lading was endorsed so as to make the coffee deliverable to Voss if he should accept *and pay* the draft; if not, to the holder of the draft. When the bill of exchange was sent with the bill of lading to Voss, he accepted the bill of exchange, which was returned to the plaintiff, but detached the bill of lading, which he endorsed to the defendant for a valuable consideration. He did not pay the bill of exchange. Lord Ellenborough said that the coffees were deliverable to Voss only conditionally; that the defendant had notice of this condition by the endorsement on the bill of lading, and that by the dishonour of the bill of exchange the property vested in the holder of the bill of exchange, not in Voss or his assigns.

Mires v.  
Solesby.

In a very old case, *Mires v. Solesby*,<sup>1</sup> the agreement was that one Alston should take home some sheep and pasture them for the owner at an agreed price per week till a certain date, and if at that date Alston would pay a fixed price for the sheep he should have them. Before the time arrived the owner sold the sheep, which were still in Alston's possession, to Mires, the plaintiff, and the Court held that the property had not vested in Alston, the condition of payment not having been performed, and that Mires could maintain trover for them under his purchase.

American cases  
on the subject  
of this chapter.

The cases in America upon this subject are not in all respects identical with those decided in our Courts.

In *Crofoot v. Bennett*,<sup>2</sup> a portion of the bricks in a specified kiln were sold at a certain price per thousand, and the possession of the whole kiln was delivered to the vendee, that he might take the quantity bought. Held, that the property had passed in the number sold. Strong, J., in delivering the opinion, said: "It is a fundamental principle

<sup>1</sup> 2 Mod. 243.

<sup>2</sup> 2 Comstock (N. Y.), 258.

pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property be separated and identified. \* \* \* The reason is that the sale cannot be applied to any article until it is clearly designated, and its identity thus ascertained. In the case under consideration, it could not be said with certainty that any particular bricks belonged to the defendant until they had been separated from the mass. If some of those in an unfinished state had been spoiled in the burning, or had been stolen, they could not have been considered as the property of the defendant, and the loss would not have fallen upon him. But if the goods sold are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until they are separated, and their identity thus ascertained and determined. The distinction in all these cases does not depend so much upon what is to be done, *as upon the object which is to be effected by it*. If that is specification, the property is not changed: if it is merely to ascertain the total value at designated rates, the change of title is effected."

In *Kimberly v. Patchin*,<sup>1</sup> the owner of a large mass of wheat lying in bulk gave the vendee a receipt acknowledging himself to hold 6000 bushels, sold for a specified price, subject to the vendee's order: and the title was held to have passed by the sale. *Whitehouse v. Frost* (*post*, p. 242), was followed and approved.

In *Olyphant v. Baker*,<sup>2</sup> the vendor sold barley in bulk at

<sup>1</sup> 19 N. Y. Rep. (5 Smith), 330.

<sup>2</sup> 5 Denio (N. Y.), 379.

a certain price per bushel, the quantity to be afterwards ascertained. The barley being in the vendor's storehouse, which was to be surrendered to another person at a future day, it was agreed that the barley should be allowed to remain in the storehouse till the vendor transferred the possession of the building: and the purchaser agreed with the transferee of the building to pay storage after that time. The goods were destroyed by fire before being measured, but after the building had passed out of the possession of the vendor. Held, that the facts showed an intention to pass the property in the barley, notwithstanding it had not yet been measured, and that the loss must fall on the buyer.

In *Rourke v. Bullens*,<sup>1</sup> the vendor sold a hog on credit, the hog to be kept and fattened till the buyer called for it, and then to be paid for at the current market price according to its weight when called for, and this was held to be a contract purely executory, not passing the property to the buyer.

In *Cushman v. Holyoke*,<sup>2</sup> where the property had actually passed to the purchaser in goods that were to be taken by him to another place, and there measured to fix the price, it was held that the vendor, and not the purchaser, must bear the loss and depreciation in measurement incident to the removal according to the common course of conveyance.

The cases of *Woods v. Russell* and *Clarke v. Spence* have not met with universal acceptance in America. Thus, in *Andrews v. Durant*,<sup>3</sup> the New York Court of Appeal held in a case, where the facts were similar to those in the above cases, that the property did not pass to the party ordering the goods till the completion of the work: and the same decision was given in Massachusetts in *Williams v. Jackson*, decided in the Superior Judicial Court in January, 1861. In these two cases the decision of the Exchequer Chamber in *Wood v. Bell*<sup>4</sup> was not before the Courts, not being cited in the latter case, and the former case bearing date in 1853, three years before the decision in the Exchequer Chamber.

<sup>1</sup> 8 Gray (Mass.), 549

<sup>3</sup> 1 Kernan (N. Y.), 35.

<sup>2</sup> 34 Maine, 289.

<sup>4</sup> 6 E. & B. 355; 25 L. J., Q. B. 321.

## CHAPTER IV.

### SALE OF CHATTEL NOT SPECIFIC.

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WHEN the agreement for sale is of a thing not specified, as of an article to be manufactured, or of a certain quantity of goods in general, without a specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is an executory agreement, and the property does not pass. There is but little difficulty in the application of this rule.

In *Wallace v. Breeds*,<sup>1</sup> the sale was of fifty tons of Greenland oil, "allowance for foot-dirt and water as customary." The vendors gave an order on the wharfingers for delivery to the purchasers of "fifty tons of our Greenland oil, ex ninety tons." The purchasers became insolvent on the day after this order was sent to the wharfinger, and the order was then countermanded by the vendors, nothing having been done on it. *Held*, that the property had not passed.

So in *Busk v. Davis*,<sup>2</sup> the vendor had about eighteen tons of Riga flax, in mats, lying at the defendant's wharf, and sold ten tons of it, giving an order to the purchaser on defendant for "ten tons Riga PDR. flax, ex Vrow Maria." In order to ascertain what portion of the flax was to be appropriated to this order, it was necessary to weigh the mats, and this had not been done, when the buyer became insolvent, and the vendor thereupon countermanded the order. *Held*, that the property had not passed.

<sup>1</sup> 13 East, 522.

<sup>2</sup> 2 M. & S. 397.



**White v. Wilks.** In *White v. Wilks*,<sup>1</sup> the sale was of twenty tons of oil, out of the vendor's stock in his cisterns. In *Austen v. Craven*,<sup>2</sup> the sale was by sugar refiners, of fifty hogsheads of sugar, double loaves, no particular hogsheads being specified. In *Shepley v. Davis*,<sup>3</sup> of ten tons of hemp out of thirty; and the contracts were all held to be executory, no property passing.

**Gillett v. Hill.** In *Gillett v. Hill*,<sup>4</sup> Bayley, J., stated the law very perspicuously in the following words: "The cases may be divided into two classes; one in which there has been a sale of goods, and something remains to be done by the vendor, and until that is done, the property does not pass to the vendee, so as to entitle him to maintain trover. The other class of cases is where there is a bargain for a certain quantity, ex a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit; then the right to them does not pass to the vendee, until the vendor has made his selection, and trover is not maintainable till that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. *There is no individuality until it has been divided.*"<sup>5</sup>

**Whitehouse v. Frost.**

The only case to be found in the reports in apparent contradiction to this principle of the law of sale, is *Whitehouse v. Frost*,<sup>6</sup> which, notwithstanding explanation by the judges in subsequent cases, is scarcely ever mentioned, without suggestion of doubt or disapproval. In that case the contract was as follows: "Mr. J. Townsend bought of J. and L. Frost, ten tons of Greenland oil, in Mr. Stainforth's cisterns, *at your risk*, at 39*l.*—390*l.*" There were then in the cistern forty tons of oil, which had belonged to Dutton and Bancroft, and they had sold ten tons of it to Frost and Co., and these were the ten tons which the latter sold to Townsend, giving Townsend an order on Dutton and Bancroft for "the ten tons of oil we purchased from

<sup>1</sup> 5 Taunt. 176.

<sup>2</sup> 4 Taunt. 644.

<sup>3</sup> 5 Taunt. 617.

<sup>4</sup> 2 C. & M. 530.

<sup>5</sup> See, also, *Campbell v. Mersey Docks Company*, 14 C. B., N. S. 412.

<sup>6</sup> 12 East, 614.

you, 8th Nov. last." The order was taken to Dutton and Bancroft by the purchaser, and accepted by them in writing, on the face of the order. Townsend left the oil in the custody of Dutton and Bancroft, and it was not severed from the bulk in the cisterns. It was held, that the property had passed, as between Frost and Townsend. Lord Ellenborough, put it on the ground, that all right in the seller was gone by the acceptance of his delivery order, in favour of Townsend, the seller never having had himself possession, but only a right to demand possession from the bailees, which right he had assigned to Townsend, just as it had been assigned to himself by his vendors. Grose, J., was of opinion, that as the *risk was in the buyer*, and the delivery complete so far as the *vendor* was concerned, the property had passed. It was the *purchaser's* business to act with Dutton and Bancroft in drawing off the ten tons of oil. Le Blanc, J., put it on the ground that the sale was complete between Frost and Townsend, because nothing remained to be done *between them*. The vendor had given to the purchaser the only possession that the vendor ever had, and the purchaser had accepted this, and Dutton and Bancroft were bailees of the oil for the purchaser's use. All that remained to be done was between the purchaser and *his* bailees. Bayley, J., was very much of the same opinion, considering the purchaser's acceptance of an order on Dutton and Bancroft, his presentation of it to them, and obtaining their assent to be his bailees, as equivalent to a consent that the goods should be deemed to have been delivered to him. This case was much questioned in subsequent decisions.<sup>1</sup> In *Wallace v. Breeds*,<sup>2</sup> Lord Ellenborough again said, "of *Whitehouse v. Frost*, there nothing remained to be done by the seller to complete the sale between him and the buyer." And in the subsequent case of *Busk v. Davis*,<sup>3</sup> where three of the judges (Lord Ellenborough, and Le

<sup>1</sup> See *White v. Wilks*, 5 Taunt. 125.

176; *Austen v. Craven*, 4 Taunt. 644;

*Campbell v. Mersey Company*, 14 C.

B., N. S. 412; *Blackburn on Sales*,

<sup>2</sup> 13 East, 525.

<sup>3</sup> 2 M. & S. 397.

Blanc, and Bayley, JJ.), who decided *Whitehouse v. Frost*, were still on the bench, they adhered to the decision, both Le Blanc and Bayley saying, however, that the sale was of an "undivided quantity," and that delivery had been made of that undivided quantity so far as in the nature of things it was possible for the vendor to deliver it.

The cases in which those contracts are considered, by which the vendor agrees to make and deliver a chattel, are reviewed in the next chapter, on "Subsequent Appropriation."

Does giving of  
earnest alter  
property?

This seems to be an appropriate occasion for considering the question whether earnest has any, and what, effect in altering the property in the goods, which are the subject-matter of the contract.

In former times, when the dealings between men were few and simple, and consisted for the most part, where sale was intended, in the transfer of specific chattels, it was said that by the giving of earnest, the property passed. Thus we have seen in the second chapter of this Book, that *Shepherd's Touchstone* contains this rule:<sup>1</sup> "If one sell me his horse, or any other thing for money, \* \* \* and I give earnest money; albeit it be but a penny to the seller, \* \* \* there is a good bargain and sale of the thing to alter the property thereof." And Noy says (*ante*, p. 218): "If the bargain be that you shall give me 10*l.* for my horse, and you gave me one penny in earnest, which I accept, this is a *perfect bargain*, you shall have the horse by an action on the case, and I shall have the money by an action of debt." But the context of both these passages shows very plainly that the authors were considering the subject of the different modes in which a bargain for the sale of a specific chattel could be completed, and were pointing out that the mere agreement of A. to buy, and B. to sell, did not constitute a bargain and sale, but that something further must be done "to bind the bargain." As soon as the bargain for the sale of the specific chattel was completed, *in what-*

<sup>1</sup> *Ante*, p. 217.

*ever form*, the property passed, and the giving of earnest is included among the modes of binding the bargain, so that neither could retract, and then the passing of the property was the result, not of giving the earnest, but of the bargain and sale.

So in *Bach v. Owen*,<sup>1</sup> the plaintiff claimed a mare under a bargain in which "the defendants, to make the agreement the more firm and binding, paid to the plaintiff one halfpenny in earnest of the bargain." The contract was that the plaintiff should give a colt and two guineas for the mare, and the defendant demurred to the declaration for want of an averment that the plaintiff was ready and willing, or offered to deliver the colt; but Buller, J., said: "The payment of the halfpenny vested the property of the colt in the defendant," and the tender was therefore unnecessary. This, again, was a perfect bargain and sale of a specific chattel, which altered the property as soon as the earnest given prevented either part from retracting.

In *Hinde v. Whitehouse*,<sup>2</sup> Lord Ellenborough, in considering the mode of passing the property in the sugar sold, rejected a defence founded on the fact that the goods were not ready for delivery because the duties had not yet been paid, and said, *arguendo*: "Besides, after earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and, therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then if he do not come and pay for and take away the goods in a convenient time, *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person." His Lordship, after quoting this *dictum* from Holt, C. J., in *Langford v. Administratrix of Tyler*, Salk. 118, and Noy's Maxims, as above, continued: "On this latter ground, therefore, *I do not think that the sale is incomplete*." This, again, was the sale of a specific chattel, and the mind of that great judge was plainly intent on the question whether there had been a "*complete*

<sup>1</sup> 5 T. R. 409.

<sup>2</sup> 7 East, 558.

sale," and the authorities on the subject of earnest were invoked solely to show that the bargain had been closed. Blackstone, also,<sup>1</sup> if his remarks be carefully considered, as well as the authorities to which he refers, contemplates earnest as a mode of binding the bargain, and thus furnishing proof of such a complete contract of sale as suffices to pass property in a specific chattel.

No case, however, has been found in the books in which the giving of earnest has been held to pass the property in the subject-matter of the sale, where the completed bargain, if proved in writing or any other sufficient manner, would not equally have altered the property. It is difficult to conceive on what principle it could be contended that the giving of earnest would pass the property, for example, in fifty bushels of wheat, to be measured out of a larger bulk. In the cases of *Logan v. Le Mesurier*,<sup>2</sup> and *Acraman v. Morris*,<sup>3</sup> it was held, as we have already seen (*ante*, p. 223-4), that where the *whole purchase money* had been paid at the time of the contract, the property did not pass in the timber which was to be afterwards measured on delivery, and it is scarcely conceivable that a penny, delivered under the name of "earnest," could be more effective in altering the property than the payment of the entire price.

Submitted that  
it does not.

It is therefore submitted that the true legal effect of earnest is simply to afford conclusive evidence that a bargain was actually completed with mutual intention that it should be binding on both; and that the inquiry whether the property has passed in such cases is to be tested, not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of the earnest.

<sup>1</sup> 2 Black. Com. 447-9.

<sup>2</sup> 6 Moore, P. C. 116.

<sup>3</sup> 8 C. B. 449.

## CHAPTER V.

### OF SUBSEQUENT APPROPRIATION.

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AFTER an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the *appropriation* of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages, instead of being completed at one time ; but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd, J., in *Rhode v. Thwaites*,<sup>1</sup> "the selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes."

The only difficulty that can arise on this question is in cases where the vendor only has made the subsequent appropriation. If it has been agreed that the purchaser shall select out of the bulk belonging to the vendor, it is not easy to raise a controversy, but the cases in which the ablest judges have been much perplexed are those where the vendor

Executory agreement converted into bargain and sale by subsequent appropriation.

When vendor is to appropriate the goods.

<sup>1</sup> 6 B. & C. 388.

is, by the express or implied terms of the contract, entitled to make the selection. A very common mode of doing business is for one merchant to give an order to another to send him a certain quantity of merchandise, as so many tons of oil, so many hogsheads of sugar. Here it becomes the vendor's duty to *appropriate the goods to the contract*. The difficulty is to determine what constitutes the appropriation: to find out at what precise point the vendor is no longer at liberty to change his intention. It is plain that the vendor's act in simply selecting such goods as he *intends* to send, cannot change the property in them. He may lay them aside in his warehouse, and change his mind afterwards; or he may sell them to another purchaser without committing a wrong, because they do not yet belong to the first purchaser, and the vendor may set aside other goods for him. It is a question of law whether the selection made by the vendor in any case is a mere manifestation of his intention, which may be changed at his pleasure, or a determination of his right conclusive on him, and no longer revocable.

Rule as to determination of election.

The rule on the subject of election is, that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which, from its nature, cannot be done till the election is determined, has authority to make the choice, in order that he may be able to do that first act, and when once he has done that act, the election has been irrevocably determined, but till then he may change his mind.<sup>1</sup>

For example, suppose A. sell out of a stack of bricks one thousand to B., who is to send his cart and fetch them away. Here B. is to do the first act, and cannot do it till the election is determined. He therefore has authority to make the choice, but he may choose first one part of the stack and then another, and repeatedly change his mind, until he has done the act which determines the election, that is, until he has put them in his cart to be fetched away; when that is done, his election is determined, and he cannot

<sup>1</sup> Heyward's Case, 2 Co. 36; Comyn's Dig. Election; Blackb. on Sales, 128.

put back the bricks and take others from the stack. So, if the contract were that A. should load the bricks into B.'s carts, A.'s election would be determined as soon as that act was done, and not before.

It follows from this, says Blackburn, J., that where from the terms of an executory agreement to sell unspecified goods the vendor is to *despatch* the goods, or do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and *the property is transferred the moment the despatch or other act has commenced*, for then an appropriation is made finally and conclusively by the authority conferred in the agreement; and in Lord Coke's language, "the certainty, and thereby the property begins by election." (Heyward's Case, 2 Coke, 36). But however clearly the vendor may have expressed an intention to choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until the act has actually commenced the appropriation is not yet final, for it is not made by the authority of the other party, nor binding on him.<sup>1</sup>

Point of time at which property passes.

A review of the authorities will show the subtle distinctions to which this subject gives rise, and the infinite diversity of circumstances under which its application becomes necessary in commercial dealings. The considerations that govern it are rendered still more complex when the vendor, although appropriating the goods to the contract by despatching them, still retains control by taking the bills of lading or other documents of title in his own name, in order to secure himself against loss in the event of the buyer's insolvency or refusal to pay. The decisions in cases where the vendor, although appropriating the goods, has reserved expressly or by implication a special property in them, will be separately examined, after disposing of those which are free from this element of controversy.

Review of the authorities.

<sup>1</sup> Blackburn on Sales, p. 128. The accuracy of this statement of the law was attested by Erle, J., in *Aldridge v. Johnson*, 7 E. & B. 885, 901; 26 L. J., Q. B. 296.



Dutton v. Solomonson.

In 1808, in the case of *Dutton v. Solomonson*,<sup>1</sup> it was treated as already settled law that where a vendor delivers goods to a carrier by order of the purchaser, the appropriation is determined; the delivery to the carrier is a delivery to the vendee, and *the property vests immediately*.

Fragano v. Long.

In 1825 *Fragano v. Long*<sup>2</sup> was decided in the King's Bench. The plaintiff sent an order from Naples to M. and Sons at Birmingham, for merchandise "to be despatched on insurance being effected. Terms to be three months' credit from the time of arrival." The goods were sent from Birmingham, marked with the plaintiff's name, to the agents of the vendors in Liverpool, with orders to ship them to the plaintiff. Insurance was made in the plaintiff's name. The goods were injured by the carrier by being allowed to fall into the water while loading them, and the action was assumpsit against the carrier. It was contended by the defendant that the property had not passed because the vessel's receipt expressed that the goods were received from the Liverpool shippers, the agents of the vendors, and they would therefore have been entitled to the bill of lading. But the Court held that the property had passed to the plaintiff from the time *the goods left the vendors' warehouse*. Holroyd, J., said the principle was that "when goods are to be delivered at a distance from the vendor, *and no charge is made by him for the carriage*, they become the property of the buyer as soon as they are sent off." The words above printed in italics suggest that where the vendor pays the charges it is presumed that he retains the property in the goods. On this point the reader will find a very full exposition of the law in the elaborate opinion of Lord Cottenham, delivering the judgment of the House of Lords in *Dunlop v. Lambert*.<sup>3</sup>

Rohde v. Thwaites.

In *Rohde v. Thwaites*,<sup>4</sup> the appropriation by the vendor was assented to by the purchaser. The purchaser bought twenty hogsheads of sugar out of a lot of sugar in bulk

<sup>1</sup> 3 B. & P. 582, *per* Lord Alvanley, Ch. J.

<sup>2</sup> 4 B. & C. 219.

<sup>3</sup> 6 Cl. & Finn. 600.

<sup>4</sup> 6 B. & C. 388.

belonging to the vendor. Four hogsheads were filled and delivered. Sixteen other hogsheads were then filled up and appropriated to the contract by the vendor, who gave notice to the purchaser to take them away, which the latter promised to do. Held, that this was an assent to the appropriation, that the contract was thereby converted into a bargain and sale, and that the property passed.

In *Alexander v. Gardner*,<sup>1</sup> decided in 1835, the property in a parcel of butter was held to have passed from the plaintiff to the defendant by subsequent appropriation with mutual assent under the following circumstances. The original contract was for "200 firkins Murphy & Co.'s Sligo butter, at 71s. 6d. per cwt. free on board; payment, bill at two months from the date of lading; to be shipped this month. 11 Oct., 1833." On the 11th November the plaintiff received from Murphy an invoice and bill of lading for these butters, which had not been shipped till 6th November. Defendant waived the delay, and consented to take the invoice and bill of lading, which described the butter, the weights and marks of the casks, &c. The butter was afterwards lost by shipwreck. Held, that the subsequent appropriation was complete by mutual assent; that the property had passed, and the buyer must suffer the loss. The case was decided directly on the authority of *Fragano v. Long and Rohde v. Thwaites*.

*Alexander v.  
Gardner.*

The same principle governed *Sparkes v. Marshall*,<sup>2</sup> decided by the same Court in the following year (1836). Bamford, a corn-merchant, sold to plaintiff "500 to 700 barrels of prepared black oats, at 11s. 9d. per barrel, to be shipped by Thomas John and Son, of Youghall." The oats were to be delivered at Portsmouth. Some days afterwards Bamford informed plaintiffs that Messrs. John & Son had engaged "room in the schooner Gibraltar Packet of Dartmouth to take about 600 barrels black oats on your account." Plaintiff next day ordered insurance, "400l. on oats per the Gibraltar Packet of Dartmouth, &c." In this

*Sparkes v.  
Marshall.*

<sup>1</sup> 1 Bing. N. C. 671. See, also 963; S. C. 7 Scott, N. B. 921.  
*Wilkins v. Bromhead*, 6 M. & G. <sup>2</sup> 2 Bing. N. C. 761.

action against the underwriters it was contended by them that the property had not passed, but the Court held the contrary. Tindal, C. J., said that Bamford's letter to the plaintiff "was an unequivocal appropriation of the oats on board the Gibraltar Packet," and "this appropriation is assented to and adopted by the plaintiff, who, on the following day gives instructions to his agent in London to effect the policy on oats per Gibraltar Packet."

*Bryans v. Nix.*

In *Bryans v. Nix*,<sup>1</sup> decided in the Exchequer in 1839, the facts were, that one Tempany, in Longford, drew a bill of exchange on the plaintiff at Liverpool, against two cargoes of oats, *per* boats Nos. 604 and 52, represented by two boat-receipts or bills of lading, whereby the masters of the boats acknowledged to have received the oats on board, deliverable in Dublin to the plaintiff's agents, for shipment thence to the plaintiff at Liverpool. The plaintiff received, on the 7th February, a letter from Tempany, dated the 2nd, containing these two boat-receipts, dated the 31st January, and thereupon accepted the bill of exchange which Tempany stated in the letter to be drawn *against these oats*. In point of fact, boat No. 604 had received its cargo, but although the master's receipt for boat 54 was dated on 31st January, the loading of it was only begun on the 1st February, and on the 6th it had received only about 400 barrels out of the 580 barrels called for by the receipt. On that day, the 6th, Tempany, pressed by the importunity of the defendant, to whom he was largely indebted, gave to the defendant an order for both the boat-loads, addressed to Tempany's agent in Dublin, and the latter accepted the order and agreed to forward the cargoes to the defendant in London. The defendant obtained possession of the oats in Dublin, and the plaintiff demanded them from him, and brought action on his refusal to deliver them. The loading of the boat No. 54 was completed on the 9th February. On these facts, after elaborate argument and time for advisement, Parke, B., delivered the judgment of the Exchequer of

<sup>1</sup> 4 M. & W. 775.

Pleas, holding, that the property in the cargo No. 604 had vested in the plaintiff, but not the cargo No. 54. In relation to the first cargo, the decision was on the ground that "the intention of the consignors was to vest the property in the consignee from the moment of delivery to the carrier, and the case resembles that of *Haille v. Smith* (1 B. & P. 563), where the bill of lading being transmitted for a valuable consideration, operated as a change of property instanter when the goods were shipped; and it is also governed by the same principle upon which I know that of *Anderson v. Clark*<sup>1</sup> was decided, where a bill of lading making the goods deliverable to a factor was, upon proof from correspondence of the intention of the principal to vest the property in the factor as security for antecedent advances, held to give him a special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery." In relation to the cargo of No. 54, however, the ground was that there were no specific chattels appropriated to it. The reasoning on this part of the case is submitted in full, because it does not seem altogether reconcileable with the subsequent case of *Aldridge v. Johnson*, *post*, p. 257, so far as regards the 400 barrels that had actually been put on board, destined for the plaintiff, *before* Tempany was persuaded to give an order for them in favour of the defendant. The learned Baron said (p. 792): "At the time of the agreement, proved by the bill of lading or boat receipt of the 31st January, to hold the 530 barrels therein mentioned for the plaintiffs, there were no such oats on board, and consequently no specific chattels which were held for them. The undertaking of the boat-master had nothing to operate upon, and though Miles Tempany had prepared a quantity of oats to put on board, those oats still remained his property: he might have altered their destination and sold them to any one else: the master's receipt no more attached to them than to any other quantity of oats belonging to

<sup>1</sup> 2 Bing. 20.

Tempany. If, indeed, after the 31st January, these oats so prepared, or any other like quantity, had been put on board to the amount of 530 barrels, or less, *for the purpose of fulfilling the contract, and received by the master as such*, before any new title to these oats had been acquired by a third person, we should probably have held that the property in these oats passed to the plaintiffs, and that the letter and receipt, though it did not operate as it purported to do, as an appropriation of any existing specific chattels, at least operated as an executory agreement by Tempany and the master and the plaintiffs that Tempany should put such a quantity of oats on board for the plaintiffs, and that when so put the master should hold them on their account; and when that *agreement was fulfilled*, then, but not otherwise, they would become their property. But before the complete quantity of 530 barrels was shipped, and when a small quantity of oats only were loaded,<sup>1</sup> and before any appropriation of oats to the plaintiffs had taken place, Tempany was induced to enter into a fresh engagement with the defendant, to put on board for him a full cargo for No. 54, by way of satisfaction for the debt due to him, for such is the effect of the delivery order of the 6th, and the agreement with Walker of the same date, to send the boat receipt for the cargo of that vessel. Until the oats were appropriated by some new act, both contracts were executory; on the 9th this appropriation took place by the boat receipt for the 550 barrels *then on board*, which was signed by the master, at the request of Tempany, whereby the master was constituted the agent of the defendant to hold these goods; and this was the first act by which *these oats* were specifically appropriated to any one. The master might have insisted on Tempany's putting on board oats to the amount of the first bill of lading, *on account of the plaintiffs*, but he did not do so."

<sup>1</sup> The reporter's statement, p. 778, is that on the 6th of February, when defendant's agent first pressed Tempany for security, "boat 54 was still

in the canal harbour at Longford, partly loaded, the loading having begun on the 1st February, and about 400 barrels being then on board."

The difficulty felt in receiving this decision as satisfactory, arises chiefly from the difference between the facts as stated by the reporter and found by the jury, and the facts as assumed in the opinion of the Court. The trial at Nisi Prius was before Williams, J., who told the jury to consider, as regards the cargo of No. 54, "whether, although the loading was not complete, the oats to be put on board were *designated and appropriated to the plaintiff*, as if they were he was of opinion that they were entitled to recover that cargo also." The jury found for the plaintiff, finding also, as a fact, "that at the time the receipts were given, the cargo for boat 54 was specially designated, although the loading was not complete." But in the opinion of Parke, B., the quantity loaded at the time when Tempany assumed the power of diverting it to a new consignee, is treated as a trifle, "only a small quantity," instead of about three-fourths of the whole as stated by the reporter, and no notice is taken of the ruling of Williams, J., or the finding of the jury, although in some earlier passages of the opinion it is expressly stated to be the law that "if the intention of the parties to pass the property, *whether absolute or special*, in certain ascertained chattels is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or ship-master, *employed by the consignor* or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough; and it matters not by what documents this is effected; nor is it material whether the person who is to have the property be a factor or not, for such an agreement may be made with a factor as well as any other individual." The Court, however, drew the *legal inference*, notwithstanding the verdict of the jury, that the oats which had been prepared for shipment on No. 54, for which the master had given a receipt in advance agreeing to deliver them to the plaintiff's agent, and of which about three-fourths had actually been put on board before the defendant made his appearance in Long-

Remarks on  
*Bryans v. Nix.*

ford, *were not received on account of the plaintiff, and had not been appropriated to the plaintiff in whole or in part.* In the case of *Aldridge v. Johnson*,<sup>1</sup> as will presently be seen, it was held that where the vendor had filled 155 out of 200 sacks of grain for the vendee, in the vendor's own warehouse, and then emptied them again into the bulk, his election was determined as soon as he had filled each sack, and that the property had passed so far as regarded the 155 sacks. But it is remarkable that in *Bryans v. Nix*, there is no suggestion, in the argument or in the decision, that there was any difference in the consignees' rights to the 400 barrels already loaded into the boat and the residue which had not been received by the master in fulfilment of the agreement that he was to deliver them to the plaintiff's agent in Dublin: nor was *Bryans v. Nix* quoted or referred to in *Aldridge v. Johnson*.

*Godts v. Rose.*  
Conditional ap-  
propriation.

In *Godts v. Rose*,<sup>2</sup> in 1854, there was a conditional appropriation, which was held not to pass the property, because the vendee had not complied with the condition. The sale was of five tons of oil, "to be free delivered and paid for in fourteen days." The plaintiff, who was the vendor, sent to his wharfinger an order to transfer eleven specified pipes to the purchaser, and took the wharfinger's acknowledgment, addressed to the buyer, that these eleven pipes were transferred to the buyer's name. The plaintiff then sent this acknowledgment to the buyer, by a clerk, who also took an invoice of the oils, and asked for a cheque in payment. This was refused, on the ground that payment was only to be made in fourteen days. The clerk then demanded that the wharfinger's acknowledgment should be returned to him, and this was refused. The buyer then sent immediately to the wharfinger, and got possession of part of the oil, but before the delivery of the rest, the vendor countermanded his order on the wharfinger. The latter, however, thinking that the property had passed, delivered the whole to the purchaser, against whom the

<sup>1</sup> 7 E. & B. 885, and 26 L. J., Q. B. 296.

<sup>2</sup> 17 C. B. 229, and 25 L. J., C. B. 61.

action was then brought in trover. All the judges were of opinion that the property had not passed, because the order for its transfer was conditional on payment, the jury having found as a fact that the plaintiff's clerk did not intend to part with the oil or the transfer order without the cheque, and that he said so at the time.

Aldridge *v.* Johnson<sup>1</sup> was decided by the Queen's Bench, Aldridge *v.*  
Johnson. in 1857. The plaintiffs agreed to take from one Knight one hundred quarters of barley, out of the bulk in Knight's granary, at 2*l.* 3*s.* a quarter, in exchange for thirty-two bullocks, at 6*l.* apiece. The difference to be paid to Knight in cash. The bullocks were delivered. The plaintiff was to send his own sacks, which Knight was to fill, to take to the railway for conveyance to the plaintiff, and to place upon trucks, free of charge. Each quarter of barley would fill two sacks, and the plaintiff sent two hundred sacks to be filled, some of them with his name marked on them. Knight filled one hundred and fifty-five of the sacks, leaving in the bulk more than enough to fill the other forty-five sacks, but could not succeed, upon application at the railway, in obtaining trucks for conveying them. The plaintiff afterwards complained to Knight of the delay, and was assured that the barley would be put on the rail that day, but this was not done; and Knight finding himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again, so as to make it undistinguishable. The action was detinue and trover, against the assignees of Knight, for the barley and the sacks. *Held*, that the property in the barley, in the one hundred and fifty-five sacks, had passed, but not in the barley which had not been filled into the other forty-five sacks. Campbell, C. J., said: "As soon as each sack was filled with barley, *eo instanti* the property in the barley in the sacks vested in plaintiff. I conceive there was here an *à priori* assent; not only was there a sale of barley, but it was a sale of part of a specific bulk, which the plaintiff had seen, and he sends the sacks to be filled out of that bulk,

<sup>1</sup> 7 E. & B. 885, and 26 L. J. Q. B. 236.



and out of that only could the vendee's sacks be filled. No subsequent assent was necessary, if the sacks were properly filled." His Lordship then showed that there was also a subsequent assent, and added: "Nothing whatever remained to be done by the vendor, for he had actually appropriated a portion of the bulk to the vendee." Erle, J., said: "Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. In the present case the *election rested with Knight alone*: he had to fill the sacks, which were to be sent to him for that purpose by the vendee, and *as soon as he had done an outward act, indicating his election, viz., by filling the sacks, and directing them to be sent to the railway, the property passed.*"

Langton v.  
Higgins.

The decision in *Aldridge v. Johnson* was followed by the Exchequer of Pleas, in 1857, in *Langton v. Higgins*,<sup>1</sup> (*ante*, p. 226).

Campbell v.  
The Mersey  
Docks.

In 1868, *Campbell v. The Mersey Docks*,<sup>2</sup> was decided in the Common Pleas. A cargo of cotton, ex Bosphorus, consisting of five hundred bales, arrived in the defendants' docks in September, 1862. The plaintiff was the broker for them, and had himself bought two hundred and fifty bales, and sold the remainder to other parties. All had one mark, but the numbers were only affixed by the defendants when the bales were landed and weighed. On the 13th September, a certificate or warehouse warrant was sent to the plaintiff, for two hundred and fifty bales, "numbered from 1 to 250, entered by J. P. Campbell, on the 10th September, 1862; rent payable from the 15th September." The plaintiff thereupon paid for the two hundred and fifty bales, getting the warrant endorsed to him with a delivery order, "for the above-mentioned goods," dated 15th September. On 7th October, the plaintiff re-sold the cotton, and sent the warrant, endorsed by him, with a delivery order for the cotton therein mentioned. The buyer repudiated the contract, on the ground that the cotton was not equal to the samples. The plaintiff then demanded back the warrant,

<sup>1</sup> 4 H. & N. 402, and 28 L. J., Ex. 252

<sup>2</sup> 14 C. B., N. S. 412.

and was told by the defendants, for the first time, that two hundred of the bales, numbered from 1 to 250, had been inadvertently delivered on the 11th and 13th September to other persons. They offered him a fresh warrant for other numbers. He declined, and brought suit for the value of the two hundred and fifty bales. On the trial, the defendants insisted that the appropriation by the company, of the two hundred and fifty bales, out of the larger number, was not sufficient to vest the property in those specific bales in the plaintiff, without his assent, and Keating, J., sustained this view. One of the jury then asked his Lordship if the plaintiff's indorsement of the warrant (on the re-sale), did not amount to such assent, and the learned judge said, it was not conclusive, but that it was open to the company to show that the appropriation was a mistake on the part of one of their clerks. The verdict was for the defendants, and the Court refused to order a new trial. Erle, C. J., said: "There certainly was some evidence of appropriation, and the question left to the jury upon that was, whether the evidence of that appropriation did not arise from a mistake on the part of the company's clerk. The learned judge is not dissatisfied with the finding of the jury upon that question." Willes, J., also said: "The real question was whether the appropriation of Nos. 1 to 250 was not a mistake. The jury found that it was. No property in the goods, therefore, ever vested in the plaintiff." But both the learned judges expressed an extra-judicial opinion upon a point, confessedly "not material," to which attention must be directed. Erle, J., said: "It has been established by a long series of cases, of which it will be enough to refer to *Hanson v. Meyer*, 6 East, 614, *Rugg v. Minett*, 11 East, 210, and *Rohde v. Thwaites*, 6 B. & C. 688, that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to both by vendor and vendee. Nothing passes until there has been an assent, express or implied, on the part of the vendee." Willes, J., assented to this statement of the law, and said: "Perhaps the case of *Godts v. Rose*,

Observations  
on dicta.

17 C. B. 229, is even more in point to show that there must not only be an appropriation, but an appropriation assented to by the vendee. The assent of the vendee may be given prior to the appropriation by the vendor; it may be either express or implied, and it may be given by an agent of the party, by the warehouseman or wharfinger, for instance."

Care must be taken not to misconceive the true sense of these *dicta*. They do not mean that a *subsequent* assent by the buyer to the appropriation made by the vendor is necessary. Willes, J., states this plainly, and Erle, J., says that there must be an assent of the vendee express or implied. This assent is implied, as shown by the language of Erle, J., himself in *Aldridge v. Johnson*, and in several of the cases already quoted, where by the terms of the contract the vendor is vested with an implied authority to select the goods, and has determined an election by doing some act which the contract obliged him to do, and which he could not do till an appropriation was made. That this is the real signification of these *dicta* is also fully shown in the strongly contested case of *Brown v. Hare*,<sup>1</sup> in which the unanimous decision of the Exchequer Chamber was likewise delivered by Erle, J.

*Brown v. Hare.* In this case the defendant, at Bristol, bought from the plaintiffs, residents of Rotterdam, through their broker, residing at Bristol, "20 tons of best oil, at 47s." The plaintiffs wrote to the broker on 19th April that they had secured ten tons for the defendant, deliverable in September, and the defendant wrote back "send them by next steamer." The oil was to be shipped "free on board." On the 7th September the plaintiffs from Rotterdam wrote to the broker to inform the defendant, which he did, that they had shipped "five tons of rape oil for defendant," and on the 8th they forwarded the invoices and bill of lading. The bill of lading was for delivery to the plaintiffs' "order or assigns," and was endorsed by them on the 8th September, "Deliver the goods to the order of Hare & Co." (the defendants). The

<sup>1</sup> 3 H. & N. 484, and 27 L. J., Ex. 372, afterwards in *Cam. Scacc.* 4 H. & N. 822, and 29 L. J., Ex. C.

invoices specified the casks by marks and numbers; and the bill of lading also identified them in the same way. The letter to the broker containing the invoices and bill of lading thus endorsed reached him on the 10th, after business hours, and on the 11th he sent them to the defendant. The ship was actually lost before the documents were received by the broker, and he knew it, but the defendant did not hear of the loss till about two hours after receiving the bill of lading, and he then immediately returned it to the broker. Bramwell, B., dissented from the majority of the Court, thinking that there had been no appropriation to pass the property, but Pollock, C. B., delivered the judgment, holding that the property had passed, and that the buyer must bear the loss; on the ground, *first*, that the contract to deliver "free on board" meant that it was to be for account of the defendant as soon as delivered on board; *secondly*, that taking the bill of lading to the shippers' own order, and then endorsing it to the defendant, was precisely the same in effect as taking the bill of lading to the order of the defendant; *thirdly*, that the bill of lading having been forwarded to the broker only that he might get the defendant's acceptance on handing it over, as provided in the contract, this did not prevent the property from passing, the goods represented by the bill of lading being in the same legal state as if in a warehouse, subject to the purchaser's order, but not to be taken by him without payment of the price.

In error to Exchequer Chamber, this judgment was unanimously affirmed, the Court consisting of Erle, Williams, Crompton, Crowder, and Willes, JJ. Erle, J., in giving the opinion, said that—"The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract must be resorted to, and under that we think *the property passed when the goods were placed free on board in performance of the contract*. In this class of contracts the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated to the purchaser, or on the act of the vendor alone. If the

bill of lading had made the goods to be delivered 'to the order of the consignee,' the passing of the property would be clear. The bill of lading made them 'to be delivered to the order of the consignor,' and he endorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus, the real question has been on the intention with which the bill of lading was taken in this form, whether the consignor shipped the goods in performance of his contract to place them free on board, or for the purpose of retaining control over them and continuing owner contrary to the contract. The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the Court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion it did not, under the circumstances."

*Tregelles v.  
Sewell.*

In *Tregelles v. Sewell*,<sup>1</sup> in 1863, both buyer and seller were residents of London, and the contract was made there. The purchaser bought "300 tons Old Bridge rails, at 5*l.* 14*s.* 6*d.* per ton, delivered at Harburg, cost, freight, and insurance: payment by net cash in London, less freight, upon handing bill of lading and policy of insurance. A dock company's weight note, or captain's signature for weight, to be taken by buyers as a voucher for the quantity shipped." *Held*, by all the judges in the Exchequer, and afterwards in Cam. Scacc., that by the true construction of this sale the seller was not bound to make delivery of the goods at Harburg, but only to ship them for Harburg at his own cost, free of any charge against the purchaser, and that the property passed as soon as the seller handed the bill of lading and policy of insurance to the purchaser.

*The Calcutta  
Company v.  
De Mattos.*

The difficulty that sometimes exists in construing contracts involving the subject now under consideration, could hardly be illustrated by a more striking example than the recent case of *The Calcutta Company v. De Mattos*,<sup>2</sup> argued by very eminent counsel in the Queen's Bench in

<sup>1</sup> 7 H. & N. 571.

<sup>2</sup> 32 L. J., Q. B. 322.

Michaelmas Term, 1862, and held under advisement till the 4th July, 1863, when the judges were equally divided in opinion; Cockburn, C. J., and Wightman, J., differing from Blackburn and Mellor, JJ. When the cause was heard in error in the Exchequer Chamber,<sup>1</sup> the diversity of opinion was still more marked, for while three judges (Erle, C. J., Willes, J., and Channell, B.) concurred in opinion with Blackburn and Mellor, JJ., and one judge (Williams, J.) agreed with Cockburn, C. J., and Wightman, J., two other judges (Martin and Pigott, BB.) differed from both.

Diversity of  
opinion.

The facts were these. On the 1st May, 1860, defendant wrote to the company, proposing to supply them with "1000 tons of any of the first-class steam-coals on the Admiralty list, at my option, delivered over the ship's side at Rangoon at 45s. per ton of 20 cwt., the same to be shipped within three months of the date of acceptance of this offer. Payment of one half of each invoice value in cash, on handing you bills of lading and policy of insurance to cover the amount, and balance by like payment on delivery," &c., &c.

The reply of the 4th May accepted the tender with the following modifications and additions: "The selection of the particular description to be at the company's option \* \* half the quantity, say not less than 500 tons, to be shipped not later than 10th June prox., and the remainder in all that month \* \* payment one half of each invoice value by bill at three months on handing bills of lading and policy of insurance to cover the amount, or in cash under discount at the rate of 5*l.* per centum per annum, at your option, and the balance in cash at the current rate of exchange at Rangoon." The contract was closed upon these conditions, and defendant in performance of it chartered the ship *Waban* for Rangoon, the company being no party to the charter, and loaded her with 1166 tons of coal, taking a bill of lading which expressed that the coal was shipped by him, and was to be delivered at Rangoon to the agent of the company or to his assigns, freight to be paid

<sup>1</sup> 33 L. J., Q. B., 214, in *Cam. Scaoc.*

by the charterer as per charter-party. The charter-party stipulated that the freight was "to be paid in London on unloading and right delivery of the cargo at 40s. per ton on the quantity delivered \* \* one quarter by freighter's acceptance at three months, and one quarter by like acceptance at six months from the final sailing of the vessel from her last port in the United Kingdom, the same to be returned if the cargo be not delivered at the port of destination; and the remainder by a bill at three months from the date of the delivery at the freighter's office in London of the certificate of the right delivery of the cargo."

The defendant also effected insurance for 1400*l.*, and handed the bill of lading and policy to the company, in pursuance of the contract, together with this letter: "5th July, 1860. Herewith I hand you Ocean Marine policy for 1400*l.* for this ship, as collateral security against the amount payable by you on account of the invoice order, say 1811*l.* 15*s.*, receipt of which please own." The answer acknowledged the receipt of the policy "to be held as collateral security for the payment to you of 1811*l.* 15*s.* on account of the invoice of that shipment."

The invoice value of the coals was 2623*l.* 10*s.*, of which the company paid half to defendant on the 5th July, and the vessel sailed on the 8th, but never arrived at her destination, nor were the coals delivered in conformity with the contract.

On these facts it became necessary to decide what was the effect of the contract on the property in the goods, and the right to the price from the time of the handing over the shipping documents and paying half the invoice value.

The opinion of Blackburn, J., was the basis of the final judgment, and was approved by the majority of the judges. It is so instructive on the whole subject, as to justify copious extracts. The learned judge said: "There is no rule of law to prevent the parties in cases like the present from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them

on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is in such cases at an end when he has delivered the goods to the carrier, and if the goods perish in the carrier's hands, the vendor is discharged and the purchaser is bound to pay him the price. See *Dunlop v. Lambert* (6 Cl. & Fin. 600). If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this also is effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination. See *Dunlop v. Lambert*. But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that when he has done so he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract, if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that then they shall be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving, just as they might if they pleased contract that the price should not be payable unless a particular tree fall, but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall." Referring to the terms of the contract under consideration, the learned judge proceeded to remark: "It is clear that the coals are to be shipped in this country, on board a vessel to be



engaged by De Mattos, to be insured, and the policy of insurance and the bill of lading and invoice to be handed over to the company. As soon as De Mattos, in pursuance of these stipulations, gave the company the policy and bill of lading, he *irrevocably appropriated to this contract* the goods which were thus shipped, insured, and put under the control of the company. After this he could never have been required nor would he have had the right to ship another cargo for the company; so that from that time, what had originally been an agreement to supply *any* coals answering the description, became an agreement relating to those coals only, just as much as if the coals had been specified from the first. \* \* \* In construing this contract, the *prima facie* construction is that the parties intended that the *property in the coals vested in the company*, and the right to the price in De Mattos, *as soon as it came to relate to specific ascertained goods*, that is, on the handing over of the documents, and the inquiry must be whether there is any sufficient indication in the contract of a contrary intention. As to one half of the price, the intention that it should only be paid 'on completion of the delivery at Rangoon,' seems to me as clearly declared as words could possibly declare it, and consequently I think as to that half of the price no right vested in De Mattos unless and until there was a complete delivery at Rangoon. But consistently with this there might be an intention that there should be a complete vesting of the property in the goods in the company, and a complete vesting of the right to the half of the price in De Mattos, so as in effect to make the goods be at the risk of the company, though half the price was at the risk of De Mattos; so that *the goods were sold and delivered*, though the payment of half the price was contingent on the delivery at Rangoon, and this I think is the true legal construction of the contract."

Wightman, J., was of opinion that on the true construction of the contract the *whole cargo remained the property of the vendor, and at his risk*: that he was bound to deliver the whole at Rangoon, and that the transfer of the policy

and bill of lading to the company was a security to protect the company in recovering back their advance of one half the price in the event of De Mattos' failure to make delivery at Rangoon.

Cockburn, C. J., thought that the *property in the coals passed to the company*, subject to the vendor's lien, for the payment of the price; that the coals, when shipped, were *specifically appropriated* to the company, and that by the transfer of the bill of lading they obtained dominion of the cargo, and could have disposed of it at their pleasure. But that De Mattos remained bound to make delivery in Rangoon, and by breach of that contract was bound to return the half of the price already paid, and to lose his claim for the remainder.

In the Exchequer Chamber, Erle, C. J., expressed his concurrence with the opinion of Blackburn, J., as to the true meaning and effect of the contract, and Willes, J., and Channell, B., did the same. Williams, J., merely expressed his assent to the views of Cockburn, C. J.

Martin, B., gave his view of the true intention of the parties, without declaring whether and when, if at all, the property passed, but remarked: "I cannot say that I agree with my brother Blackburn's judgment:" and Pigott, B., expressed his concurrence with the interpretation of the contract by Martin, B.

Before leaving this branch of the subject, it is well to notice that the property does not pass even when the vendor has the power to elect, unless he exercise it in conformity with the contract. He cannot send a larger quantity of goods than those ordered, and throw the selection on the purchaser. Thus, in *Cunliffe v. Harrison*,<sup>1</sup> it was *held* that where an order was given for ten hogsheads of claret, and the vendor sent fifteen, the action for goods sold and delivered would not lie against the purchaser (who refused to keep any of the hogsheads), on the ground that no specific

Vendor's election must be in conformity with the contract.

Cannot elect more than contract requires, and leave buyer to select.  
*Cunliffe v. Harrison.*

<sup>1</sup> 6 Ex. 903. See, also, *Hart v. Mills*, 15 M. & W. 85, and *Dixon v. Fletcher*, 3 M. & W. 145.

hogsheads had been appropriated to the contract, and thus no property had passed. And in *Levy v. Green*,<sup>1</sup> the goods sent in excess of those ordered were articles entirely different, but packed in the same crate: the order being for certain earthenware teapots, dishes, and jugs, to which the plaintiff had added other earthenware articles of various patterns not ordered. In the Court below,<sup>2</sup> there was an equal division of the judges, Lord Campbell and Wightman, J., holding that the defendant had a right to reject the whole on account of the articles sent in excess, and Coleridge and Erle, JJ., being of a different opinion; but in the Exchequer Chamber, Martin, Bramwell, and Watson, BB., and Willes and Byles, JJ., were unanimous in holding with Lord Campbell, and Wightman, J., that the property had not passed, and that the purchaser had the right to reject the whole.

Subsequent appropriation of chattel to be manufactured.  
*Mucklow v. Mangles.*

The decisions as to subsequent appropriation in cases where the agreement was for the delivery of a chattel to be manufactured begin with *Mucklow v. Mangles*,<sup>3</sup> in 1803. Pocock ordered a barge from one Royland, a barge-builder, and advanced him some money on account, and paid more as the work proceeded, to the whole value of the barge. When nearly finished, Pocock's name was painted on the stern, but by whom and under what circumstances is not stated in the report. The barge was finished and seized on execution against Royland two days *afterwards*, but before he had delivered it up to Pocock, and the sheriff's officer delivered it to Pocock under an indemnity. Royland had committed an act of bankruptcy *before* the barge was finished, and the action was trover by his assignees against the sheriff's officer. Held, that the property had not passed, Heath, J., saying: "A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to

<sup>1</sup> 1 E. & E. 969, and 28 L. J., Q. B. 319.

<sup>2</sup> 27 L. J., Q. B. 111.

<sup>3</sup> 1 Taunt. 318.

complain; he could not bring trover against the purchaser of the goods so sold."

In *Bishop v. Crawshay*,<sup>1</sup> it was held by the Queen's Bench, in 1824, that no property passed to the defendant in goods which he had ordered from a manufacturer in the country, and on account of which he had accepted a bill of exchange for 400*l*. The manufacturer had received the order on the 26th January, had committed an act of bankruptcy not known to the defendant on the 5th February, and on the 6th drew the above-mentioned bill of exchange. On the 8th the goods were completed and loaded on barges to be forwarded to the defendant, and on the 15th a commission issued against the bankrupt, by whose assignees the action of trover was brought. Holroyd, J., said: "The goods were made, but until the money paid was appropriated to these particular goods the defendant could not have maintained trover for them, if they had been even sold to another person."

In *Atkinson v. Bell*,<sup>2</sup> already fully explained (*ante*, p. 72), the purchaser had ordered the machines; they had been made and packed under his agent's superintendence, and the boxes made ready to be sent, and the vendor had written to ask the purchaser by what conveyance they were to be sent, but had received no answer, when he became bankrupt. His assignees then brought an action against the purchaser (who refused to take the goods) for goods *bargained and sold*, this form of action not being maintainable where the property has not passed. *Held*, that the form of action was misconceived; it should have been for not accepting the goods: the property had not passed, for although the vendor *intended* them for the purchaser, his right to revoke that intention still existed, and he might have sold the goods to another at any time before the buyer assented to the appropriation. This is perhaps the strongest case in the books on this subject, for the conduct of the vendor was as near an approximation to a determination of election, without

*Bishop v.  
Crawshay.*

*Atkinson v.  
Bell.*

Remarks on  
this case.

<sup>1</sup> 3 B. & C. 415.

<sup>2</sup> 8 B. & C. 277.

actually becoming so, as one can well conceive. It is distinguishable from *Fragano v. Long*<sup>1</sup> only on the ground that in this latter case the order was to *despatch* the goods for the buyer's account, and when the goods were despatched it was really the act of the buyer through his agent the seller, and this act of the buyer constituted an implied assent to the appropriation made by the seller, which then became no longer revocable. In *Atkinson v. Bell*, this element was deficient. But there was another circumstance in that case, adverted to in the judgment of the Court, which renders it almost impossible to distinguish it from *Rohdes v. Thwaites*.<sup>2</sup> The defendant had made Kay, his agent, to *procure the machines*; and the report states that they were altered so as to suit Kay, and then packed up by *Kay's directions*, which is equivalent to their being packed up by the buyer's own directions; and surely if the buyer, after goods have been completed on his order, is informed by the seller that they are ready for him, and then examines and directs them to be packed up for him, this constitutes as strong an assent to the appropriation as was given by the purchaser in *Rohdes v. Thwaites*, when he said, without seeing the sugar that had been packed up for him, that he would send for it. Many attempts have been made to reconcile *Atkinson v. Bell* with the principles recognised in the other cases on the subject, but it is very difficult to avoid the conclusion that a conflict really exists, and that if correctly reported, the case would not on *this particular point* be now decided as it was in 1828.

*Elliott v.  
Pybus.*

In *Elliott v. Pybus*,<sup>3</sup> in 1834, a machine was ordered by defendant, and he deposited with plaintiff 4*l.* on account of the price. When completed, he saw it, paid 2*l.* more on account, but made no final settlement. In reply to a demand for 10*l.* 19*s.* 8*d.*, the balance of the account, defendant admitted that the machine was made according to his order, and asked plaintiff to send it to him before it was paid for. This was *held* an assent to the appro-

<sup>1</sup> 4 B. & C. 291.

<sup>2</sup> 6 B. & C. 388.

<sup>3</sup> 10 Bing. 512.

priation, and a count for goods bargained and sold was maintained.

The cases in relation to the appropriation of an unfinished chattel, paid for by instalments during the progress of the work, have already been examined in Chapter III. of this Book, pp. 228, *et seq.*

Appropriation  
of chattel dur-  
ing progress of  
manufacture.

## CHAPTER VI.

### RESERVATION OF THE JUS DISPONENDI.

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Preliminary  
observations on  
this subject.

It has already been shown that the rules for determining whether the property in goods has passed from vendor to purchaser, are general rules of *construction* adopted for the purpose of ascertaining the real intention of the parties, when they have failed to express it. Such rules from their very nature cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However definite and complete, therefore, may be the determination of election on the part of the vendor, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation.

The cases which illustrate this proposition arise chiefly where the parties live at a distance from each other, where they contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. If A., in New York, orders goods from B., in Liverpool, without sending the money for them, there are two modes usually resorted to, among merchants, by which B. may execute the order without assuming the risk of A.'s inability or refusal to pay for the goods on arrival. B. may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and

send it to his agent, with instructions not to transfer it to A. except on payment for the goods. Or B. may not choose to advance the money in Liverpool, and may draw a bill of exchange for the price of the goods on A., and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods, to be delivered to A. on due payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that B. had the least idea of passing the property to A., at the time of appropriating the goods to the contract. So that although he may write to A., and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A.'s account, and in accordance with A.'s order, making his election final and determinate, the property in the goods will nevertheless remain in B., or in the banker, as the case may be, till the bill of lading has been indorsed and delivered up to A. These are the most simple forms in which the question is generally presented, but we shall see that in this class of cases as well as in that just discussed, it is often a matter of great nicety to determine whether or not the vendor's purpose or intention was really to reserve a *jus disponendi*.

In *Walley v. Montgomery*,<sup>1</sup> the plaintiff had ordered a cargo of timber from S. and Co., and they informed him by letter that they had chartered a vessel for him, and afterwards sent him in another letter the bill of lading and invoice, advising that they had drawn on him at three months, "for the value of the timber." The invoice was of a cargo of timber, "shipped by order, and for account and risk of Mr. T. Walley, at Liverpool," and the bill of lading was made "to order or assigns, he or they paying freight, &c." S. and Co. sent at the same time another bill of lading, with bills of exchange drawn on the plaintiff for the price, to the defendant, who was their agent, and he got the cargo from the captain. The plaintiff applied to the defendant

*Walley v. Montgomery.*

<sup>1</sup> 3 East, 585.



for the cargo, offering to accept the bills of exchange, but the latter insisted on immediate payment; and on the plaintiff's refusal, sold the cargo, under direction of S. and Co. Trover was brought, and Lord Ellenborough at first nonsuited the plaintiff, who did not prove a tender of the freight, but afterwards joined the other judges in setting aside the nonsuit, on the ground that the property passed by the invoice and bill of lading, and that the vendor had lost all rights over the goods, save that of stoppage *in transitu* (as to which, see *post*, Book V., Ch. V.).

Coxe v. Harden.

In *Coxe v. Harden*,<sup>1</sup> the property was held to have passed under somewhat singular circumstances. Oddy and Co., of London, ordered a purchase of flax, from Browne and Co., of Rotterdam, who executed the order, and sent an invoice to Oddy and Co., and a bill of lading, *unindorsed*, by which the goods were made deliverable to Browne and Co., and a letter, stating, "We have drawn on you at two usances in favour of Lucas, Fisher, and Co., &c. We close this account in course." Browne and Co. then sent another bill of lading of the same set to the plaintiff, *indorsed*, for the purpose of securing the amount of their bill upon Oddy and Co. Oddy and Co. transferred their unindorsed bill to the defendant, in payment of an antecedent debt, and the defendant got delivery of the flax on that bill, and sold it, notwithstanding plaintiff's warning and demand for the goods under his indorsed bill. The action was trover, and the Court held, that even assuming the plaintiff to have all the rights of the vendor, he could not succeed, because the property in the goods had passed by the shipment for the buyer's account, and no right remained in the vendor, save that of stoppage *in transitu*. No notice was taken of the vendor's purpose to retain a *jus disponendi*, Lord Ellenborough saying, that *the only thing* which stood between Oddy and Co., and their right to possession, was "the circumstance of the captain's having signed bills of lading in such terms as did not entitle them to call upon him for a

<sup>1</sup> 4 East, 211.

delivery under their bill of lading. But that difficulty has been removed, for the captain has actually delivered the goods to their assigns." It is to be remarked of this case, that the date at which the bill of lading was indorsed by Browne and Co., to the plaintiff, was not shown; that it was perhaps not so indorsed till after the goods had got into possession of the defendant, and stress was laid on this by one of the judges. At the same time no one of them adverted to the fact, as having any influence on the decision, although printed in italics in the report, that the indorsed bill of lading was sent to the plaintiff by Browne and Co., expressly "for the purpose of securing the amount of their bill upon Oddy and Co." See *Moakes v. Nicholson*,<sup>1</sup> and *Brandt v. Bowlby*,<sup>2</sup> *infra*.

Remarks on  
this case.

In *Ogle v. Atkinson*,<sup>3</sup> it was again held, that the property had passed, notwithstanding the vendor's attempted reservation of a *jus disponendi*, but the attempt was fraudulent. The plaintiff ordered goods from Smidt and Co., at Riga, in return for wine consigned to them for sale the previous year, and sent his own ship for the goods, which were delivered to the captain, who received them in behalf of plaintiff, and as being plaintiff's own goods, according to the statement of Smidt and Co. themselves. They afterwards obtained from the captain, by fraudulent misrepresentation, bills of lading in blank, for the goods so shipped, and sent them to their agent, with orders to transfer them to a third person, unless plaintiff would accept certain bills of exchange which Smidt and Co. drew in favour of that third person. Held, that the property had passed, by the delivery to the plaintiff's agent, and was not divested nor affected by the subsequent acts of Smidt and Co.

*Ogle v. Atkinson.*

In *Craven v. Ryder*,<sup>4</sup> the vendor maintained his right. The plaintiffs agreed to sell to French and Co. twenty-four hogsheads of sugar, free on board a British ship, two months being the usual credit. They sent it by a lighter, taking a

*Craven v. Ryder.*

<sup>1</sup> 34 L. J., C. P. 273; 19 C. B., N. S.  
290, *post*, p. 287.

<sup>3</sup> 5 Taunt. 759.

<sup>4</sup> 6 Taunt. 433.

<sup>2</sup> 2 B. & Ad. 932, *post*, p. 276.

receipt from the ship "for and on account of the plaintiffs," which was proven to be *for the purpose of giving the shipper command of the goods* till exchanged for the bill of lading. French and Co. sold the goods, and the defendant gave a bill of lading for them to the vendee of French and Co. without the plaintiffs' privity. French and Co. stopped payment without paying the price of the sugar, and plaintiffs claimed it, but the defendant refused to deliver to them on the ground that the bill of lading already signed for it in favour of the buyer from French and Co. had been assigned to another vendee, who had in turn paid for it in good faith. The jury found that the receipt given to the plaintiffs for the sugar was "*restrictive*," and that they had done nothing to alter their right of possession of the goods. The Court *held*, that without regard to the form of the receipt, the plaintiffs had the right "to refrain from delivering the goods, unless under such circumstances as would enable them to recall the goods if they saw occasion," and had exercised that right. This seems to be but another mode of describing what, in more recent cases, is termed a reservation of the *jus disponendi*. *Ruck v. Hatfield*,<sup>1</sup> on similar facts, was decided in conformity with *Craven v. Ryder*.

Brandt v.  
Bowlby.

In *Brandt v. Bowlby*,<sup>2</sup> the vendor was again successful. The facts were that one Berkeley, of Newcastle, ordered wheat from the plaintiffs, Brandt and Co., of St. Petersburg, through their agent, E. H. Brandt, of London. A dispute arose between Berkeley and E. H. Brandt, and the former countermanded all his orders. In the meantime, however, the plaintiffs had bought a cargo for him, and they put it on board the defendants' ship *Helena*, which Berkeley had chartered and sent for the wheat. They wrote, requesting Berkeley's approval, and enclosed him "invoice and bill of lading of 770 chests wheat shipped for your account and risk per the *Helena*. \* \* \* An *endorsed* bill of lading we have this day forwarded to Messrs. Harris and Co., of London, at the same time drawing upon them for 673*l.* 15*s.*,"

<sup>1</sup> 5 B. & Ald. 632.

<sup>2</sup> 2 B. & Ad. 932.

and for the balance remaining in our favour, viz., 136*l.* 9*s.* 5*d.*, we value on you, &c., &c." An *unendorsed* bill of lading was enclosed to Berkeley, together with an invoice of "wheat bought by order and for account of J. Berkeley, Esq., Newcastle, and shipped at his risk to London to the address of R. Harris and Sons there per the *Helena*." The endorsed bill of lading was forwarded by the plaintiffs to E. H. Brandt, their agent. Berkeley refused to accept, and ordered Harris and Co. not to accept. Thereupon E. H. Brandt gave Harris and Co. the *endorsed* bill of lading, and desired them to accept for *his* account, which they did. Berkeley then confirmed his revocation, and was notified by E. H. Brandt that he should retain the whole of the wheat for the plaintiffs. Afterwards Berkeley offered to pay the price of the wheat and charges, but this was refused. The defendants delivered the wheat to Berkeley, instead of Harris and Co., as required by the bill of lading, and when sued in *assumpsit*, sought to defend themselves by maintaining that the property in the wheat had passed to Berkeley. The Court held the contrary, Parke, B., saying: "That depends entirely on the intention of the consignors. It is said that the plaintiffs, by the very act of shipping the wheat in pursuance of Berkeley's order, irrevocably appropriated the property in it to him. I think that is not the effect of their conduct, for, looking to the letter of the 26th of August, it manifestly appears that they *intended that the property should not vest in Berkeley unless the bills were accepted.*"

In *Wilmshurst v. Bowker*,<sup>1</sup> the plaintiffs bought wheat from defendant on a contract by which they promised to pay for it in a banker's draft, *on receipt of invoice and bill of lading*. The wheat was shipped, and the invoice and bill of lading properly made out and *endorsed to the plaintiffs* were forwarded to them in a letter, in which the defendant requested them to remit him the amount of the invoice. Plaintiffs remitted a draft which was not a banker's draft, and defendant sent it back by return of post, as being contrary

*Wilmshurst v.  
Bowker.*

<sup>1</sup> 2 M. & G. 792.

to the agreement, and kept back the cargo and disposed of it. The plaintiffs had already failed in an action in trover,<sup>1</sup> and the present action was case for breach of contract. The judgment of the lower Court was again for defendant, Tindal, C. J., saying: "There is no doubt that the *property* in the wheat passed to the plaintiffs, \* \* \* but the question is as to the intention of the parties, as evidenced by the contract, with reference to the *delivery of possession*. And we are of opinion that the intention of the parties under this contract was, that the consignors should *retain the power of withholding the actual delivery* of the wheat in case the consignee failed in remitting the banker's draft, not upon the delivery of the wheat, but upon the delivery of the bill of lading, \* \* \* and we think the object could have been no other than to afford security to the consignors." But on error to the Exchequer Chamber, this decision was unanimously reversed,<sup>2</sup> the Court, composed of Lord Abinger, C. B., Parke, Alderson, and Rolfe, BB., and Patteson, Coleridge, and Wightman, JJ., saying that they acceded to the general principle of the judgment of the Common Pleas, but could not agree with it in inferring from the facts that the remitting of the banker's draft was a condition precedent to the vesting of the property in the plaintiffs. "The delivery of the bill of lading and remitting the banker's draft *could not* be simultaneous acts: the plaintiffs *must* have received the bill of lading and invoice *before* they could send the draft."

**Waite v. Baker.** In *Waite v. Baker*,<sup>3</sup> which is a leading case, decided in 1848, the facts were that the defendant at Bristol bought from one Lethbridge 500 quarters of barley free on board at Kingsbridge, and in answer to an inquiry about the shipment wrote to Lethbridge: "I took it for granted that you would get a vessel for the barley I bought from you f. o. b., and therefore did not instruct you to seek one. \* \* \* Please advise when you have taken up a vessel, with particulars of the port she loads in, so that I may get insurance done correctly."

By further correspondence, Lethbridge forwarded copy of

<sup>1</sup> 5 Bing. N. C. 541.

<sup>2</sup> 7 M. & G. 882.

<sup>3</sup> 2 Ex. 1.

the charter-party which he had taken in his own name; advised the commencement of the loading; and on the 1st January, 1847, wrote: "I hope to be able to send you invoice and bill of lading on Tuesday or Wednesday." And again on the 6th: "I expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you." The bills of lading for the cargo were to the "order of Lethbridge or assigns, paying the freight as per charter." Lethbridge took them to Bristol, called on the defendant, and left at his counting-house, early in the morning, an *unendorsed* bill of lading. At an interview with defendant at a later hour on the same day, the defendant made objections to the quality of the cargo, saying that it was inferior to sample, offered to take the cargo and tendered the amount in money, but said that he should sue for eight shillings a quarter difference. Lethbridge refused to accept the money or to endorse the bill of lading, but took it up from the counter and went to the plaintiffs, from whom he obtained an advance on endorsing the bill of lading to them. The defendant obtained part of the barley from the ship before the plaintiffs presented their bill of lading, and the action was trover for the portion of the cargo so delivered. The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that Lethbridge was not an agent intrusted with the bill of lading by defendant. There was a verdict for the plaintiff at *Nisi Prius*, and on the motion for new trial, Parke, B., gave the reasons on which the rule was discharged: "It is perfectly clear that the original contract between the parties was not for a specific chattel. That contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was agreed to be delivered. By the original contract, therefore, no property passed, and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property it must be shown in this form of action,—the action being for the recovery of

the property,—that at some subsequent time the property passed. It may be admitted that if goods are ordered by a person, although they are to be selected by the vendor and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods which have been selected in pursuance of the contract are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, either by note in writing or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract. In this case it is said that the delivery of the goods on ship-board is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, *but a delivery to the captain of the vessel, to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried.* By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods therefore still continued in possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. \* \* \* It is admitted by the learned counsel for the defendant that the property does not pass unless there is a subsequent appropriation of the goods. \* \* \* Appropriation may be used in another sense, viz., where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it. It is contended in this case that something of that sort subsequently took place. I must own that I think the delivery on board the vessel could not be an appropriation in that sense of the word. \* \* \* The

vendor has made his election to deliver those 500 quarters of corn. The next question is, whether the circumstances which occurred at Bristol afterwards, amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that the property in that corn should pass. It is clear that his object was to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo. On the other hand, as has been observed, the defendant wished to obtain the cargo, and also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that at the time when the unendorsed bill of lading was left, there was no agreement between the two parties that that specific cargo should become the property of the defendant. \* \* \* There is a contract to deliver a cargo on board, and probably for an assignment of that cargo by endorsing the bill of lading to the defendant; but there was nothing which amounted to an *appropriation*, in the sense of that term which alone would pass the property." This conclusion of the learned judge is substantially a statement that, though the determination of election by the vendor was complete, and the appropriation therefore perfect in one sense, yet the reservation of the *jus disponendi* prevented it from being complete "in that sense of the term which alone would pass the property." The case is quite in harmony with all the later decisions on the subject.

Van Casteel *v.* Booker<sup>1</sup> was decided by the same Court in the same year. The goods in that case had been placed by the vendor on board of a vessel sent for them by the vendees, and a bill of lading taken for them deliverable "to order or assigns," and showing that they were "freight free," and the bill of lading was endorsed in blank by the vendor and sent to the vendees. On the different questions arising in the case, which were numerous, it was held:

Van Casteel *v.*  
Booker.

*First*, that the decisions in *Ellershaw v. Magniac*<sup>2</sup> and

<sup>1</sup> 2 Ex. 691.

<sup>2</sup> 6 Ex. 570. The case was not re-

ported till some years after it had been decided.



Waite *v.* Baker<sup>1</sup> had been correct in holding that the fact of making the bill of lading deliverable to the order of the consignor, was decisive to show *that no property passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods till he did a further act.*

*Second*, that notwithstanding the form of the bill of lading, the contract may be really made by the consignor as agent of the vendee and in his behalf, and *it was a question for the jury*, in the case before the Court, what, under all the circumstances, was the real intention of the consignors or vendors. On the new trial, the jury found that the goods were put on board for, and on account of and at the risk of, the buyer, and the Court refused to set aside the general verdict for the defendants which had been entered on this finding of the jury.

Jenkyns *v.*  
Brown.

In 1850, the case of Jenkyns *v.* Brown<sup>2</sup> was decided in the Queen's Bench. Klingender, a merchant in New Orleans, had bought a cargo of corn on the order of plaintiffs, and taken a bill of lading for it, deliverable to his own order. He then drew bills for the cost of the cargo on the plaintiffs, and sold the bills of exchange to a New Orleans banker, to whom he also indorsed the bill of lading. He sent invoices and a letter of advice to the plaintiffs, showing that the cargo was bought and shipped on their account. *Held*, that the property did not pass to plaintiffs, as the taking of a bill of lading by Klingender in his own name was "nearly conclusive evidence" that he did not intend to pass the property to plaintiffs; that by delivering the indorsed bill of lading to the buyer of the bills of exchange, he had conveyed to them "a special property" in the cargo: and by the invoice and letter of advice to the plaintiffs, he had passed to them the "general property" in the cargo, subject to this special property, so that the plaintiffs' right to the goods would not arise till the bills of exchange were paid by them.

<sup>1</sup> 2 Ex. 1.

<sup>2</sup> 14 Q. B. 496, and 19 L. J., Q. B. 286.

The case of *Turner v. Trustees of Liverpool Docks*,<sup>1</sup> was decided in the Exchequer Chamber in 1851, the Court being composed of Patteson, Coleridge, Wightman, Erle, Williams, and Talfourd, JJ. A cargo of cotton had been purchased in Charleston, on the order of Higginson and Dean, of Liverpool, and put on board their own vessel, which had been sent for it. Bills of exchange for the price were drawn by Menlove and Co., on the buyers, and sold to Charleston bankers, to whom were transferred, as security, the bills of lading, which had been signed by the master. The bills of lading made the goods deliverable "to order, or to our (Menlove and Co.'s) assigns, he or they paying freight, *nothing, being owner's property*." The question was, whether by delivery on board the purchaser's own vessel, and by the statement in the bill of lading that the cotton was owner's property, the title had so passed as to render inoperative the transfer of the bill of lading to the Charleston bankers. The Court took time to consider, and the decision was given by Patteson, J., who said: "There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms, restraining the effect of such delivery. In the present case, the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool, to their order or assigns, and there was not, therefore, a delivery of the cotton to the purchasers *as owners*, although there was a delivery on board their ship. The vendors still *reserved to themselves*, at the time of delivery to the captain, the *jus disponendi* of the goods, which he by signing the bill of lading acknowledged, and without which it may be assumed that the vendors would not have delivered them at all. \* \* \* The plaintiffs in error rely upon the terms of the invoice and the expression in the bill of lading, that the cotton is free of freight, being owner's property, as showing that the delivery on board the

*Turner v. Trustees of Liverpool Docks.*

<sup>1</sup> 6 Ex. 543. See, also, *Schotsman v. Lancaster and York Railway Company*, L. R. 2, Ch. App. 332, and other cases cited *post*, Book V., Ch. V., on "Stoppage in Transitu."

ship was with intention to pass the property absolutely; but the operative terms of the bill of lading, as to the delivery of the goods at Liverpool, and the letter of Menlove and Co., of the 23rd October, show too clearly for doubt, that notwithstanding the other terms of the bill of lading and the invoice, Menlove and Co. had no intention, when they delivered the cotton on board, of parting with the dominion over it, or vesting the absolute property in the bankrupts."

Ellershaw v.  
Magniac.

Ellershaw v. Magniac<sup>1</sup> was decided prior to Van Casteel v. Booker,<sup>2</sup> and is referred to in that case, but was not reported till 1851. There the plaintiff had contracted with C. and Co., of London and Odessa, for the purchase of 1700 quarters of Odessa linseed, had paid half the price, and had sent the Woodhouse, a vessel chartered by himself, "to take on board, from agents of the said freighter, about 1700 quarters of linseed, in bulk;" and a quantity of linseed was put on board the vessel at Odessa, the partner there writing to the London partner, "With regard to your sales of linseed, Mr. Ellershaw will receive a part by the Woodhouse;" and again, "By Friday's post you shall have the bill of lading of the linseed, by the Woodhouse." The Odessa partner afterwards took a bill of lading for the cargo, and made it deliverable "to order or assigns," and being in difficulties, got advances by transferring the bills of lading to the defendant. Held, by the Court (Lord Abinger, C. B., and Parke and Alderson, BB.), that the shippers, by making the linseed deliverable to order by the bill of lading, clearly showed *the intention to preserve the right of property and possession in themselves*, until they had made an assignment of the bill of lading to some other person: and the property, therefore, had not passed to the plaintiff.

Joyce v. Swan.

In Joyce v. Swan,<sup>3</sup> a decision was rendered in 1864, by the Common Pleas, on the following facts: McCarter, of Londonderry, on the 14th February, 1863, ordered one hundred tons of guano, from Seagrave and Co., of Liver-

<sup>1</sup> 6 Ex. 570.

<sup>2</sup> 2 Ex. 691, 702.

<sup>3</sup> 17 C. B., N. S. 84.

pool, with whom he had been in the habit of dealing, and was on very intimate terms. On the 26th, he was informed that the Anne and Isabella had been engaged to carry about one hundred and fifteen tons, and "we presume we may value upon you at six months from the date of shipment at 10*l.* per ton. \* \* \* Please say if you purpose effecting insurance at your end." On the 2nd March, McCarter ordered Joyce, the plaintiff, an insurance broker, to insure for him, "1200*l.*, on guano, valued at 1200*l.*, per Anne and Isabella, from Liverpool to Derry." Then, on 3rd March, McCarter wrote to Seagrave and Co., in relation to the price of 10*l.* : "I really cannot understand this, when I know that Mr. Lawson supplies your guano, in Scotland, at 9*l.* 15*s.* nett, there, to dealers ; besides, I look for the special allowance made to me at the origin of our transactions, and now that you are making some changes, it may be as well that I should know how we are to get on for the future. I should be sorry, indeed, to appear unreasonable in my demands, but you will admit there is no one in this country has a prior claim on you." The letter ended with a request to send him some flowering shrubs, "in charge of captain." Seagrave and Co. received this letter on the 4th March, and fearing from its tenor that McCarter would not accept the cargo, insured it in their own name, on that day, and took a bill of lading, "to order of Seagrave and Co., or their assigns." They also on the same day made out an invoice of "the particulars of guano delivered to account of McCarter, by Seagrave and Co., per Anne and Isabella."

The invoice and bill of lading were forwarded in a letter to the senior partner of Seagrave and Co., who was then in Ireland, and on the evening of Saturday, the 7th March, he went on a friendly visit to McCarter's private house near Londonderry, and there told him that he had received these papers from his partners, who feared that McCarter was not satisfied. McCarter said he was quite willing to take the cargo, and on Monday morning they went into town together, and at McCarter's office Seagrave endorsed the bill

of lading to McCarter and obtained from him an acceptance for the price, which he at once enclosed to his firm at Liverpool. After this and on the same day, they heard that the Anne and Isabella had been wrecked on the evening of Saturday the 7th. The action was on the policy effected by Joyce in behalf of McCarter, and was defended by the underwriters on the ground that the property had not passed to the purchaser, and that he had therefore no insurable interest.

Erle, J., charged the jury that it was not a necessary condition of the passing of the property that the price should be agreed on; that there might be a contract of sale, leaving the price to be afterwards settled; that if the guano was appropriated to McCarter when put on board by Seagrave and Co. with the intention of passing the property, they must find for plaintiff, but *if they intended to keep it in their own hands* and under their own control till a final arrangement took place as to the terms of the bargain, they must find for defendant. The verdict was for plaintiff, and was sustained by the Court. The letter of McCarter was construed by the judges as a "grumbling" assent to the price.

Observations on  
this case.

It is to be remarked that this case is not at all in conflict with *Turner v. Liverpool Docks*, or *Waite v. Baker*, in holding that although the shipper took the bill of lading to his own order, yet the property had passed when the goods were put on board. The distinction is a plain one. In the former cases the shipper had taken the bill of lading to his own order for the purpose of *retaining control* of the goods for his own security; but in *Joyce v. Swan*, the shippers and vendors had no purpose nor desire to keep any control of the goods, but on the contrary, wished the buyer to take them. They were doubtful of the buyer's meaning, and therefore took a precaution against leaving the property uninsured and uncared-for if his letter meant that he refused the purchase; but they were acting as his agents and intended to *reserve nothing, no jus disponendi*, if his meaning was that he assented to the price. The buyer interpreted his own language just as the Court did; he had

meant to take the goods even at the price of 10*l.*, and that being so, the vendors were his agents in taking the bills of lading; and the case is exactly in accord with *Van Casteel v. Booker*,<sup>1</sup> where it was left to the jury to decide as a question of fact, what was the intention of the vendor under all the circumstances of the case; and with *Brown v. Hare*,<sup>2</sup> where it was held that the question of intention must be considered as having been disposed of by the verdict of the jury, because it was one of the facts for their decision on the trial.

In the recent case of *Moakes v. Nicholson*,<sup>3</sup> the facts were, that a sale was made by one Josse to Pope for cash, of a quantity of coal, parcel of a heap lying in Josse's yard, to be shipped on board of a vessel chartered by Pope in his own name and on his own behalf, to carry it to London. The coal was shipped by Josse, who took three bills of lading, making the coal deliverable to "Pope or order." Only one of the three bills was stamped, and that was kept by Josse, but the second, with invoice and letter of advice, was sent to Pope on the 19th December, and received by him on the 20th. Josse being unable to get the price from Pope, sent the stamped bill to his agent, the defendant. In the meantime, on the 18th December, Pope had sold the coal on the London Exchange, but before it had been separated from the heap in Josse's yard, to the plaintiff, who paid for the coals before action brought. The defendant induced the captain of the vessel to refuse delivery to the plaintiff, and took possession of the coal himself. The plaintiff brought trover. *Held, first*, that the plaintiff had no better right than his vendor, Pope, because at the time of his purchase the goods were not ascertained and no bills of lading had been given, so that the sale had not been made by a transfer of documents of title; *secondly*, that no title had passed to Pope from Josse, because the retention of the stamped bill of lading by the latter was a clear indication of his intention to reserve the *jus disponendi*;

*Moakes v. Nicholson.*

<sup>1</sup> 2 Ex. 691.

<sup>2</sup> 34 L. J., C. P. 273; 19 C. B., N.

<sup>3</sup> In Cam. Scac. 4 H. & N. 822; 29 S. 290.

L. J., Ex. 6.

*thirdly*, that the intention of Josse was a fact to be determined by the jury. But *semble*, per Byles and Keating, JJ., that if Pope's sale had been made after his receipt of the bill of lading by endorsing it over, although unstamped, to a *bonâ fide* purchaser, the result might have been different. The *ratio decidendi* of the case was clearly that Pope's sale was of a thing not yet his, of property not yet acquired, and therefore inoperative to pass the property. *Ante*, p. 58.

Fulke v.  
Fletcher.

In *Fulke v. Fletcher*<sup>1</sup> the plaintiff, a merchant of Liverpool, acting in behalf of De Mattos of London, had chartered from the defendant a vessel to load a complete cargo of salt for Calcutta. The plaintiff had put on board about 1000 tons of salt, for which he took receipts in his own name, when De Mattos failed, and the plaintiff declined to continue loading, whereupon the defendant filled up the vessel for his own account, and refused to deliver to the plaintiff bills of lading for the 1000 tons, on the ground that they belonged to De Mattos. It was proven that the plaintiff was in the habit of buying such cargoes for De Mattos, and charged him no commission, but an advance on the cost of the salt to remunerate himself for his trouble; that the plaintiff always paid for the salt and loaded it at his own expense, and when the cargo was completed sent invoices to De Mattos and received the acceptances of the latter for the cost. Held, under these circumstances, a question of intention for the jury, whether the plaintiff intended to part with the property in the salt or to reserve it, and a verdict in favour of the plaintiff that he had not parted with the goods was maintained.

Rules deduced  
from the review  
of the authorities.

The following seem to be the principles established by the foregoing authorities:—

*First.* Where goods are delivered by the vendor in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee.<sup>2</sup>

<sup>1</sup> 18 C. B., N. S. 403; 34 L. J., C. P. 146.

<sup>2</sup> *Waite v. Baker*, 2 Ex. 1. See, also, *Dawes v. Peck*, 8 T. R. 330;

*Secondly.* Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried. This principle runs through all the cases, and is clearly enunciated by Parke, B., in *Waite v. Baker*,<sup>1</sup> and by Byles, J., in *Moakes v. Nicholson*.<sup>2</sup>

*Thirdly.* The fact of making the bill of lading deliverable to the order of the vendor, is, when not rebutted by evidence to the contrary, decisive to show his intention to preserve the *jus disponendi*, and to prevent the property from passing to the vendee.<sup>3</sup>

*Fourthly.* The *prima facie* conclusion that the vendor reserves the *jus disponendi*, when the bill of lading is to his order, may be rebutted by proof that in so doing he acted as agent for the vendee, and did not intend to retain control of the property; and it is for the jury to determine as a question of fact what the real intention was.<sup>4</sup>

*Fifthly.* That although as a general rule the delivery of goods by the vendor, on board the purchaser's own ship, is a delivery to the purchaser, and passes the property, yet the vendor may by special terms restrain the effect of such delivery, and reserve the *jus disponendi*, even in cases where the bills of lading show that the goods are free of freight, because owner's property.<sup>5</sup>

*Dutton v. Solomonson*, 3 B. & P. 582; *London and North Western Railway Company v. Bartlett*, 7 H. & N. 400, and 31 L. J., Ex. 92; *Dunlop v. Lambert*, 6 Cl. & Fin. 600.

<sup>1</sup> 2 Ex. 1.

<sup>2</sup> 19 C. B., N. S. 290; 34 L. J., C. P. 273.

<sup>3</sup> *Wilmshurst v. Bowker*, 2 M. & G. 792; *Ellershaw v. Magniac*, 6 Ex. 570; *Waite v. Baker*, 2 Ex. 1; *Van Casteel v. Booker*, 2 Ex. 691; *Jenkyns v. Brown*, 14 Q. B. 496, and 19 L. J., Q. B. 286.

<sup>4</sup> *Van Casteel v. Booker*, 2 Ex. 691; *Brown v. Hare*, 4 H. & N. 822,

and 29 L. J., Ex. 6; *Joyce v. Swan*, 17 C. B., N. S. 84; *Moakes v. Nicholson*, 19 C. B., N. S. 290; 34 L. J., C. P. 273.

<sup>5</sup> *Turner v. Liverpool Dock Trustees*, 6 Ex. 543; *Ellershaw v. Magniac*, 6 Ex. 570; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Van Casteel v. Booker*, 2 Ex. 691; *Moakes v. Nicholson*, 19 C. B., N. S. 290; 34 L. J., C. P. 273; *Fulke v. Fletcher*, 18 C. B., N. S. 403; 34 L. J., C. P. 146; *Schotsman v. Lancashire and Yorkshire Railway Company*, L. R. 2, Ch. App. 332.



## CHAPTER VII.

### EFFECT OF A SALE BY THE CIVIL LAW.

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An attempt must now be made to give a summary, necessarily very imperfect, of the principles of the Civil Law, in regard to the nature of the contract of sale and its effect in passing the property in the thing sold. The subject is the more difficult, because there is a marked distinction between the modern civil law and the Roman law, and because the doctrines are subtle and technical, requiring for elucidation at least some general idea of the mode in which the Romans entered into contracts at different periods in their history.

Discovery of  
Institutes of  
Gaius.

The civilians of the present generation have enjoyed an immense advantage over their eminent predecessors, Pothier and d'Aguesseau, Cujas and Vinnius, Domat and Dumoulin. The Digest, Code and Institutes of Justinian, compiled in the sixth century, during the reign of that emperor (A.D. 527—565), formed prior to the year 1816, the almost ex-

clusive source from which was derived a knowledge of Roman jurisprudence; and in that famous *corpus juris civilis*, the name of Gaius was confounded with those of the other eminent jurists, whose responses (or as we should call them opinions on cases submitted), were adopted by the imperial law-giver as a part of the statutory law of the empire. It was, however, known that the Institutes of Justinian were modelled on those of Gaius, who lived nearly four centuries earlier, during the reigns of Antoninus Pius and Marcus Aurelius. But the works of Gaius were believed to be irretrievably lost till the year 1816, when Niebuhr discovered in a convent at Verona a parchment manuscript of Roman law, of which the original text had been partially obliterated to give place to a theological work of one of the fathers of the fifth century.<sup>1</sup> Savigny recognised the old writing to be the text of Gaius, and after several months of patient labour, the original manuscript was restored almost in its integrity, thus giving to the civilians a succinct and methodical treatise on the whole body of the Roman law as it existed in the second century of our era. By means of this invaluable addition to former sources of information, the modern German and French commentators have been able to pour a flood of light on many questions formerly obscure, and it is from their works that the following summary is chiefly extracted.

Sale was considered as the offspring of exchange, and for many centuries it was disputed whether there was any difference in the nature of these contracts. “*Origo emendi, vendendique a permutationibus cæpit, olim enim non ita erat nummus; neque aliud merx, aliud pretium vocabatur.*”<sup>2</sup> And in the earliest period of the republic, when the laws of the Twelve Tables sufficed for the simple dealings of a rude peasantry, or of the poor city clients of the Roman patricians, the contracts were formed solely by means of actual exchange made on the spot, as the very names evince; for the

Sale the offspring of exchange.

<sup>1</sup> See a very interesting account of this discovery in the preface to the

first edition of Gaius.

<sup>2</sup> Dig. 18, 1. De Contrah. Emptione.

things were either exchanged by the *permutatio*, or given for a price by the *venumdatio*.

Dare, facere,  
præstare.

Afterwards, when the idea of binding one party to another by consent, and thus forming an obligation (*juris vinculum*), was entertained, the whole body of possible engagements between man and man was included in the three expressions, dare, facere, præstare: dare, to give, that is, to transfer ownership: facere, to do, or even abstain from doing an act: præstare, to furnish or warrant an enjoyment or advantage or benefit to another. And these three classes of engagements might arise out of three classes of obligations, only two of which gave a right of action, the third being available only for defence in some special cases. The three classes of obligation were, civil obligations, which gave a right of action at law: prætorian or honorary obligations, which gave the right to sue in equity, that is, to invoke the equitable jurisdiction of the prætor:<sup>1</sup> and natural obligations, for which there was no action at law or in equity, but which might be used in defence, as in *compensatio* or set-off. "Etiam quod natura debetur, venit in compensationem."<sup>2</sup>

Civil, præto-  
rian and natural  
obligations.

The vendee then, like all other contracting parties, had certain actions<sup>3</sup> which alone he was permitted to institute against the vendor. The Institutes of Gaius give us the form of declaration in an action *in personam*. "In personam actio est, quotiens cum aliquo agimus, qui nobis ex contractu, vel ex delicto obligatus est: id est, cum intendimus, dare, facere, præstare oportere."

Four stages in  
mode of making  
sales in Rome.

Nexum.

Now, the mode of forming contracts of sale in Rome passed through four successive stages after the primitive one of actual exchange from hand to hand. 1st, the *nexum*, which was effected *per æs et libram*, and consisted in weighing out a certain weight of brass, and using certain solemn words, *nuncupatio*, which operated together as a symbol to form a perfect sale (at a period when men had not learned to write), termed *nexum*, *mancipium*, *mancipatio*, *alienatio per æs et libram*, all of which had fallen into disuse and

<sup>1</sup> For these two classes giving rights of action, see Inst. 3, 13, 1.

<sup>2</sup> Dig. 16, 2, 6, Ulp.

<sup>3</sup> Com. 4, § 2.

derision long before the time of Gaius,<sup>1</sup> who says, "in odium venerunt." 2nd, the sale by certain sacramental words alone, and dispensing with the *æs et libram*: this was the *stipulation*,<sup>2</sup> which bound only *one side*, from its very nature, because it consisted in a promise made in response to the stipulator. A stipulation, therefore, might bind the vendor or the vendee; it required *two* stipulations to bind both. The rigorous solemnities and sacramental formulæ of the old law of the Quirites, were upheld with strictness by the Patricians and Priests, so that by an exaggerated technicality, the words "Spondes? Spondeo," forming a stipulation, were not allowed to be used by any but Roman citizens,<sup>3</sup> foreigners and barbarians being compelled to adopt other words, as "Promittis," "Dabis," "Facies," for the same purpose, these latter expressions being deemed *juris gentium*. But Justinian tells us that this form of contract was obsolete in his day.<sup>4</sup> 3rd. The third step in the progress of the law naturally occurred when men had learned generally to write, and every Roman citizen kept a book called a register or account-book (*tabulæ, codex accepti et depensi*). The law declared that an entry made in this book in certain terms, admitting the price to be considered as weighed out and given, should be equivalent to the actual ceremony *per æs et libram*, and should constitute not simply a proof of the sale, but the written contract itself, *literarum obligatio*. This book was carefully written out once a month from a diary or blotter (*adversaria*), and was treated as a proof of the highest character, Cicero saying of

Stipulatio.

Literarum obligatio, or Expensilatio.

<sup>1</sup> Gai. 4, 30.

<sup>2</sup> The etymology of this word is doubtful: Paulus derives it from *Stipulum*, an old word, meaning firm. Sent. 5, 7, § 1. Festus, in his abridgment of Valerius Flaccus, says: "Stipem esse nummum signatum, testimonio est et id, quod datur stipendium militi, et quum spondetur pecunia, quod stipulari dicitur;" and Isidor of Seville (lib. 4, Orig. c. 24), says: "Dicta stipulatio a stipula. Veteres enim

quando sibi aliquid promittebant, stipulam tenentes frangebant, quam iterum jungentes, sponsiones suas agnoscebant." This last etymology seems to be merely an invention, as the French say, *apres coup*. Such a mode of contracting, and such a derivation, if true, could scarcely have been unknown to Paulus and Festus.

<sup>3</sup> Gai. Com. 3, 93.

<sup>4</sup> Inst. 3, 15, 1.

- the *tabulæ*, that they are "*æternæ, sanctæ, quæ perpetuæ existimationis fidem et religionem amplectuntur*."<sup>1</sup> This contract was said also to be an *expensilatio*, from the entries in these books, the party who paid money, entering it under this head, as *pecunia expensa lata*, and the one who received it as *pecunia accepta relata*. 4th. The fourth and last stage was the contract by mutual consent alone; and it is again a remarkable instance of the strict technicality of the Roman law,<sup>2</sup> that it allowed but four contracts to be made in this manner, on the ground that they were contracts *juris gentium*, while all others were still required to be made with the formalities of the Roman municipal statutes. These four contracts are sale (*emptio-venditio*), letting for hire (*locatio-conductio*), partnership (*societas*), and agency or mandate (*mandatum*). They are also the only contracts of the Roman law that were termed bilateral, or synallagmatic, or reciprocal; that is, binding the parties *mutually* (*ultra-citroque*), every other form of contract being unilateral, *i.e.*, binding one party only, and requiring to be repeated in the reverse form in order to bind the other, as in the *stipulatio*.
- Mutual consent.
- Four contracts *juris gentium*.
- Bilateral or synallagmatic.
- Distinction between sale in Rome and at common law.
- Price must be certain.
- Sale was not a transfer of ownership.
- The sale being at last permitted by mutual consent, its elements were the same as at the common law, with the exceptions now to be considered.
- 1st. The price was to be *certain*, either absolutely or in a manner that could be determined, as for *centum aureos*; or for what it cost you, *quantum tu id emisti*; or for what money I have in my coffer, *quantum pretii in arca habeo*.<sup>3</sup> The common law rule, that in the absence of express agreement a reasonable price is implied, did not exist in the Roman law.
- 2ndly. It was a received maxim in the Roman law that the vendor did not bind himself to transfer to the buyer the property in the thing sold; his contract was not *rem dare*, but *præstare emptori rem habere licere*. The texts abound in

<sup>1</sup> Pro Roscio, 3, § 2.

<sup>2</sup> Gaius thus complains: "Namque ex nimia subtilitate veterum qui tunc jura condiderunt, eo res

perducta est ut vel qui minimum errasset, litem perderet."—L. 4, § 30.

<sup>3</sup> Dig. 18, 1, De Contrah. Empt. 7, §§ 1 & 2.

support of this statement. "Qui vendidit, necesse non habet fundum emptoris facere," unless he made a special and unusual stipulation to that effect, for the text goes on to say, "ut cogitur qui fundum stipulanti spopondit."<sup>1</sup> If the vendor was owner, the property passed by virtue of his promise to guaranty possession and enjoyment, but if not, the sale was still a good one, and its effect was simply to bind the vendor to indemnify the buyer, if the latter was "evicted," that is, dispossessed *judicially* at the suit of the true owner. Ulpian's explanation is entirely lucid. "Et in primis ipsam rem præstare venditorem oportet, id est, tradere. Quæ res, si quidem dominus fuit venditor, facit et emptorem dominum; si non fuit, tantum evictionis nomine venditorem obligat, si modo pretium est numeratum, aut eo nomine satisfactum."<sup>2</sup> It resulted, therefore, that on the completion of a contract of sale, the vendor was bound simply to deliver possession, and the buyer had no right to object that the vendor was not owner. But the possession thus to be transferred, was something more than the mere manual delivery, and the Romans had a special term for it: it must be *vacua possessio*, a free and undisturbed possession, not in contest when delivered; "*vacua possessio emptori tradita non intelligitur, si alius in ea, legatorum fidei commissorum servandorum causa in possessione sit: aut creditores possideant. Idem dicendum est si venter in possessione sit. Nam et ad hoc pertinet Vacui appellatio.*"<sup>3</sup> And if the vendor knew that he was not the owner and made a sale to a buyer ignorant of that fact, so as wilfully to expose the latter to the danger of eviction, the vendor's conduct was deemed fraudulent, and the buyer was authorised to bring an equitable suit, *Ex Empto*, without waiting for the eviction. "Si sciens alienam rem ignorant mihi vendideris, etiam priusquam evincatur, utiliter<sup>4</sup> me Ex Empto acturum putavit [Africanus] in id, quanti meâ intersit, meam esse factam. Quamvis enim alioquin

Vendor was bound only to deliver possession.

Where vendor knew he was not owner.

<sup>1</sup> Dig. 18, 1, 25, § 1, Ulp.

<sup>2</sup> Dig. 19, 1, 11, § 1, Ulp.

<sup>3</sup> Dig. 19, 1, 2, § 1, Paulus.

<sup>4</sup> Utiliter, that is, in equity, before the Prætor.

verum sit, venditorem hactenus teneri ut rem emptori habere liceat, non etiam ut ejus faciat; quia tamen dolum malum abesse præstare debeat, teneri eum, qui sciens alienam, non suam, ignoranti vendidit."<sup>1</sup>

What was  
meant by  
eviction.

The eviction against which the vendor was bound to warrant the buyer, was the actual dispossession effected by means of a judgment in an action by a third person, and it was not enough that judgment was rendered if not executed. In Pothier's edition of the Pandects, he thus states the rule and cites a response of Gaius:—"Cum ea res evicta dicatur, quæ per judicem ablata est, hinc non videbitur evicta, si condemnatio exitum non habuit, et adhuc rem habere liceat. Exemplum affert Gaius. Habere licere rem videtur emptor, et si is qui emptorem in evictione rei vicerit, ante ablatam vel abductam rem sine successore decesserit, ita ut neque ad fiscum bona pervenire possint, neque privatim a creditoribus distrahi, tunc enim nulla competit emptori ex stipulatu actio: quia rem habere ei licet. L. 57, Gaius, lib. 2 ad Ed. Ædil.-Curul."<sup>2</sup>

Remedies of  
evicted pur-  
chaser—

1st—Actio Ex  
Empto.

The evicted purchaser had two actions, one *Ex Empto*, which was the *actio directa*, resulting from the very nature of the contract, and in which the recovery was for damages consisting of the value of the thing at the *date of eviction*, and any expenses incurred in relation to it, the true principle in this action being to restore the buyer to the condition in which he would have been,

<sup>1</sup> Dig. 19, 1, 30, § 1. The text may be thus translated for the benefit of those not familiar with the technical terms of the Roman law:—"If you, knowing a thing to be another's, sell it to me, who am ignorant of the fact, Africanus was of opinion that even before eviction an equitable suit *ex empto* might be maintained by me for damages (literally, for as much interest as I had, that the thing should become mine). For, although it would otherwise be true that the vendor is only bound to guaranty possession to the

buyer, not also that the thing should become the buyer's, yet because he ought also to warrant the absence of fraud, a man is held responsible, who, knowing the thing to be another's, not his own, has sold it to one ignorant of that fact."

<sup>2</sup> Pothier, Pandectæ Justinianæ, lib. 21, tit. 2. De Evict. Para. 2, No. XII. So strict was the rule, that the buyer had no remedy if evicted under the sentence of an arbitrator, or by compromise.—Ib. No. XVI.

not if he had never bought, but if he had not been dispossessed.<sup>1</sup>

The second action was *De Stipulatione duplæ*, and arose out of a custom of stipulating that the buyer, in case of eviction, should receive, as an indemnity, double the price given. This stipulation became so general, that under an *Edictum Ædilium-Curulium*, it was considered to be implied in all sales, unless expressly excluded: "*Quia assidua est Duplæ stipulatio, idcirco placuit ex Empto agi posse si duplam venditor Mancipii non caveat. EA ENIM QUÆ SUNT MORIS ET CONSUETUDINIS, IN BONÆ FIDEI JUDICIIS DEBENT VENIRE.*"<sup>2</sup> The whole of the second title of the 21st Book of the Digest is devoted to this subject, *De Evictionibus et Duplæ Stipulatione*.

2nd—*Actio De Stipulatione duplæ.*

In consequence of the peculiar obligations of the vendor as warrantor against eviction, he was called the *auctor*, who was bound *auctoritatem præstare*, to make good his warranty; and the form of procedure was, that whenever the buyer was sued by a person claiming superior title to the thing sold, it was his duty to cite his vendor, and make him party to the action, so as to give him an opportunity of urging any available defence. This proceeding was termed *litem denuntiare*; or *auctorem laudare: auctorem interpellare*: and the buyer who failed to cite in warranty his vendor, without a legal excuse for his default, lost his remedy. "*Emptor fundi, nisi auctori aut heredi ejus denuntiaverit, evicto prædio, neque Ex stipulatu, neque Ex dupla, neque Ex empto actionem contra venditorem vel fidejussorem ejus habet.*"<sup>3</sup>

Vendor was bound as *auctor* to make good his warranty.

It would seem the natural consequence of these principles, that a vendor who did not even profess to transfer title, must necessarily suffer the loss, if the thing sold perished before delivery, on the maxim that *res perit domino*. But, on the contrary, the rule was explicitly laid down in

Thing sold was at buyer's risk before delivery, although the property had not passed.

<sup>1</sup> The texts are collected in Pothier, *Pand. Just.* lib. 19, tit. 1, ch. 1, Nos. 43 to 47, under the head—"Quanti teneatur venditor emptori, evictionis nomine, hac actione ex Empto."

<sup>2</sup> *Dig. lib. 21, tit. 2, l. 31, § 20, Ulp. De Ædil. Edict.*

<sup>3</sup> *Code, tit. de Evic. et Dup. Stip.*, l. 8.



conformity with ours at common law, as exemplified in *Rugg v. Minett*,<sup>1</sup> where the buyer of the turpentine was held bound to suffer the loss of the goods destroyed before delivery, on the ground that the ownership had vested in him. The reasoning by which this result was reached in the Roman law is thus explained by an eminent French jurist. After citing the text of the Institutes,<sup>2</sup> which is in these words: "Cum autem emptio et venditio contracta sit, quod effici diximus simul atque de pretio convenerit, cum sine scriptura res agitur, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit;" the commentator says: "Quels sont les effets de la vente? C'est de produire des obligations: le vendeur est obligé de livrer et de faire avoir la chose à l'acheteur. Eh bien! si depuis la vente il y a eu des fruits, des accroissements, il sera obligé de même de livrer et de faire avoir ces fruits, ces accroissements. (Dig. 19, 1, de Action. Empt. 13; §§ 10, 13 et 18, Ulp.) Si la chose a diminuée, s'est détériorée sans sa faute il ne sera obligé de la livrer, de la faire avoir, qu'ainsi diminuée, ainsi détériorée; et si la chose a péri sans sa faute, son obligation aura cessé d'exister. Voilà tout ce que signifie cette maxime, que la chose, du moment de la vente, est aux risques de l'acheteur. C'est à dire que l'obligation du vendeur de livrer et de faire avoir, s'appliquera à la chose telle qu'elle se trouvera par suite des changements qu'elle aura pu éprouver. Il ne s'agit dans tout ceci que de l'obligation du vendeur. Et s'il y a perte totale nous ne ferons qu'appliquer cette règle commune de l'extinction des obligations, que le débiteur d'un corps certain (*species*) est libéré lorsque ce corps a péri sans son fait ou sans sa faute. (Dig. 45, 1, de Verb. Oblig. 23, Pomp.) Mais que deviendra l'obligation de l'acheteur relativement au prix? Le prix convenu devra-t-il être augmenté ou diminué selon que la chose aura reçu des accroissements ou subi des détériorations? En aucune manière: le prix restera toujours le même. Et si la chose vendue a péri totalement, de sorte

<sup>1</sup> 11 East, 210, *ante*, 222.

<sup>2</sup> Inst. 3, 23, 3.

que le vendeur se trouve libéré de l'obligation de la livrer, l'acheteur le sera-t-il aussi de celle de payer le prix? Pas davantage. Les deux obligations une fois contractées ont une existence indépendante: la première peut se modifier ou s'éteindre dans son objet par les variations de la chose vendue—la seconde n'en continue pas moins de subsister, toujours la même. (Dig. 18, 5, de Rescind. Vend. 5, § 2.) Tel était le système Romain—et c'est pour cela qu'il est vrai de dire que du moment de la vente, l'acheteur court les risques de la chose vendue, bien que le vendeur en soit encore propriétaire."<sup>1</sup>

But although the risk of loss before delivery was thus imposed on the buyer, it was on condition that the vendor should be guilty of no default in taking care of the thing till he transferred it into the buyer's possession, for an accessory obligation of the vendor was *præstare custodiam*. "Et sane periculum rei ad emptorem pertinet, dummodo custodiam venditor ante traditionem præstet."<sup>2</sup>

Vendor was bound *præstare custodiam*.

Such were the leading principles of the Roman law as to the effect of sale in passing title, and such was the law of the continent of Europe wherever based on the civil law, till the adoption and spread of the Code Napoleon, first among the Latin races, and more recently among the nations of central and northern Europe. The French Code says in a few emphatic words, "La vente de la chose d'autrui est nulle," Art. 1599, and would thus seem to have swept away at once the entire doctrine dependent upon the Roman system, which was based on a principle exactly the reverse. But unfortunately the definitions of the nature and form of the contract in the Arts. 1582 and 1583, gave some countenance to the idea that such was not the intention of the authors. Instead of defining a sale to be a transfer of the property or ownership, the language is, in Art. 1582: "La vente est une convention par laquelle l'un s'oblige à livrer une chose, et l'autre à la payer;" and in 1583: "Elle est parfaite entre les parties, et la propriété est acquise de droit

French law.

<sup>1</sup> Ortolan, Explic. Hist. des Inst., tome 3, p. 282.      <sup>2</sup> Dig. 47, 2, de Furtis, 14, Ulp.

à l'acheteur, à l'égard du vendeur, dès qu'on est convenu de la chose et du prix, quoique la chose n'ait pas encore été livrée ni le prix payé." The consequence of this almost literal adoption of the texts of the Roman law was, that not only an eminent jurist, but the Court of Cassation itself, will be found to furnish authority for the position that a sale transfers only a right of possession, not a title of ownership. Toullier, one of the most accredited commentators, is of this opinion;<sup>1</sup> and there is a decision of the highest court in France in conformity with it.<sup>2</sup> But this view seems to be now exploded, and all the recent writers, including such great authorities as Duranton, Zachariæ, and Troplong, insist that the modern idea of the transfer of ownership is what was really intended by the authors of the civil code.<sup>3</sup> M. Fréméry gives the following clear exposition of the origin of the difficulty, and adds his authority to that of the great body of French jurists in support of the position that the modern civil law is on this point opposite to that of the Corpus Juris Civilis:—

"The fragments preserved in the Digest conclusively prove that custom had consecrated at Rome an habitual formula for contracts of sale, subject to special clauses, which were to be added to suit the circumstances. According to this formula, it was the vendor who spoke, *legem dicebat*. It was customary according to this formula for the vendor, in expressing the engagements which he agreed to assume, to use these words: *præstare emptori rem habere licere*; terms which, strictly construed, are not as wide in their import as the words *rem dare*. The jurists decided on this state of facts that every ambiguous clause was to be interpreted against the vendor, whose fault it was, not to have expressed himself more clearly. They further decided that he was not bound to transfer ownership.

<sup>1</sup> Tome 14, No. 240 *et seq.*

<sup>2</sup> Sirey, 32, 1, 623.

<sup>3</sup> Favart, V<sup>o</sup> Vente; Duranton, t. 16, No. 18; Troplong, Vente, tit. 1, Nos. 4 *et seq.*; tit. 2, add. au même

No.; Duvergier, tit. 1, Nos. 10 *et seq.*; Championnière et Rigaud, Dr. d'Enreg, t. 3, No. 1745; Zachariæ, t. 2, § 349.

“Justinian inserted these decisions in his Digest, and made them the law ; so that, deriving their authority from legislation, and not from the special circumstances of fact, on which the juriconsults had reasoned, they became applicable to every contract of sale by its nature, as recognised by the law. If, then, the old formula is abandoned, and the vendor uses the words, *rem dare*, and no longer *rem habere licere*, how can one explain a law which declares that the vendor does not bind himself to transfer the ownership ? And if, using neither locution, he simply says, ‘ I sell,’ and leaves it to usage to determine the meaning which it has attached to these words, what is to be done if it be manifest that all who use these words attach to them the idea that the vendor binds himself to transfer the ownership ?

“This is precisely what has happened. For many centuries it has been taught in our schools that it is of the nature of the contract of sale that the vendor is not bound to make the purchaser the owner of the thing sold : *ipse dixit!* And yet for many centuries also, the words ‘ I sell,’ are no longer paraphrased by the Roman formula which determined their meaning ; the man who utters them or hears them, understands unhesitatingly that he who sells is to make the purchaser owner of the thing sold ; and every one is asking how it is that by the nature of the contract of sale, the vendor is not bound to transfer the ownership to the purchaser.

“Since the Civil Code has appeared, however, and has declared in the Art. 1599, ‘ The sale of another’s thing is null,’ many persons have inferred that this must be because the two parties have the intention, one of transferring, the other of acquiring, the property in the thing sold : so that the nature of the contract of sale, which, according to the Roman law, did not impose on the vendor the obligation of transferring the ownership to the purchaser, does on the contrary, according to the French law, comprehend this obligation.”<sup>1</sup>

<sup>1</sup> Fréméry, *Etudes du Droit Commercial*, p. 5.

# BOOK III.

## AVOIDANCE OF THE CONTRACT.

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### CHAPTER I.

#### MISTAKE, AND FAILURE OF CONSIDERATION.

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It has already been shown that a party who has given an apparent assent to a contract of sale, may refuse to execute it if the assent was founded on a mistake of a material fact, such as the subject-matter of the sale, the price, and in some instances, the identity of the other contracting party.<sup>1</sup> The contract in such case has never come into existence for want of a valid assent. We enter now on the consideration of cases where the contract has been carried into effect under a continuance of mistake, and when the party who contracted through error is no longer passive, declining to execute, but active, seeking to set it aside.

<sup>1</sup> *Ante*, pp. 36 *et seq.*

The mistake alleged as a reason for avoiding a contract may be that of both parties, or of one alone; it may be a mistake of law or of fact; and when the mistake is that of one party alone, that fact may be known or unknown to the other contracting party.

When there has been a mutual mistake as to some essential fact, forming an inducement to the sale, that is, when the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the sale is voidable. If either party has performed his part during the continuance of the mistake, he may set aside the sale on discovering the truth, unless he has done something to render impossible a *restitutio in integrum* of the other side, a restoration to the condition in which he was before the contract was made. If that be not possible, the deceived party must be content with a compensation in damages. And this rule is applicable to cases even where the mistake of the complaining party was caused by the fraud of the other.<sup>1</sup>

Mutual mistake.

Contract cannot be rescinded where *restitutio in integrum*, impossible.

Even when mistake was caused by fraud.

In *Strickland v. Turner*,<sup>2</sup> the sale was of an annuity, dependent on a life that had ceased without the knowledge of either party, and the purchaser paid his money. Held, that he could recover it back as money had and received.

*Strickland v. Turner*.

In *Cox v. Prentice*,<sup>3</sup> the plaintiff bought a bar of silver, and by agreement it was sent to an expert to be assayed, and on his report of the quantity of silver contained in the bar, the plaintiff paid for it. There was a mistake in the assay, and the quantity of silver was much less than was stated in the report. Held to be a mutual mistake, and that the plaintiff, on offer to return the bar, could recover the price paid in *assumpsit*, Lord Ellenborough saying, it was just as if an article is sold by weight, and there is an accidental misreckoning of the weight.

*Cox v. Prentice*.

The case of *Boulton v. Jones*<sup>4</sup> was a very singular case of

*Boulton v. Jones*.

<sup>1</sup> *Hunt v. Silk*, 5 East, 449; *Blackburn v. Smith*, 2 Ex. 783; *Sully v. Fearn*, 10 Ex. 535; *Clarke v. Dickson*, E. B. & E. 148; 27 L. J., Q. B.

223.

<sup>2</sup> 7 Ex. 208.

<sup>3</sup> 3 M. & S. 344.

<sup>4</sup> 2 H. & N. 564; 27 L. J., Ex. 117.

Observations on  
Boulton v.  
Jones.

mutual mistake, and is well worth consideration. The facts have already been stated at length (*ante*, p. 41), and were substantially these:—One Brocklehurst kept a shop. He owed money to the defendant Jones. One day he sold out his shop and business to the plaintiff Boulton. On the same day, Jones, ignorant of this sale, sent a written order for goods to the shop, addressed to Brocklehurst, and Boulton supplied them. Jones consumed the goods, still ignorant that they were supplied by Boulton, and when payment was asked for, declined, on the ground that he had a set-off against Brocklehurst, with whom *alone* he had assented to deal. The action was for goods sold, and the Court held that there was no contract by Jones with the plaintiff, and that inasmuch as he had a set-off against Brocklehurst, the mistake as to the person was sufficient to entitle him to refuse payment. So far the case was in accordance with the rule laid down by Gibbs, C. J., in *Mitchell v. Lepage*<sup>1</sup> (not cited in *Boulton v. Jones*), and the plaintiff could not be permitted to recover. But on the principles governing contracts in general, it is submitted that the plaintiff was not wholly without remedy. For aught that appears in the report, there was a clear case of mutual mistake. The plaintiff, who had just bought out the shop and business of Brocklehurst, did nothing wrong, nothing out of the usual course of trade in supplying goods on a written order sent by a customer to the shop, addressed to the man whose business he had just bought, and in ignorance of the fact that it could be at all material to the buyer whether the goods were supplied by himself or by his predecessor in business. Plaintiff's mistake was his ignorance that the defendant wished to buy *quà* creditor of Brocklehurst, so as to pay for the goods by a set-off. Defendant's mistake was in consuming the goods of the plaintiff, in the belief that they were the goods of Brocklehurst. It can hardly be doubted that if the goods had not been consumed before the discovery of the mistake, the defendant would

<sup>1</sup> Holt, N. P. 253.

have been bound on demand to return the goods if he did not choose to pay for them. The very basis of the decision was that there had been *no contract* between the parties, and if so, on no conceivable ground could the defendant have kept without payment another man's goods sent to his house by mistake. The consumption of the goods prevented the possibility of a simple avoidance of the contract on the ground of mutual mistake. That mistake was in relation to the *mode of payment*. The vendor thought he was to be paid in money: the buyer intended to pay in his claim against Brocklehurst. The real question under the circumstances then was this: Is the buyer to pay as *he* intended, or as the *vendor* intended? for both had intended that the property in the goods should pass, at the price fixed in the invoice. Now, in determining this, which was the real dispute, a controlling circumstance is that the buyer was wholly blameless, whereas the seller had been guilty of some slight negligence. If the seller had sent an invoice or bill of parcels with the goods, showing that *he* was the vendor, the buyer would have been at once informed of the mistake, and might have rejected the goods; but the vendor delayed sending his invoice till the goods were consumed. The true result therefore of the whole transaction, it is submitted, is in principle this, that the buyer was bound to pay for the goods in the manner in which he had assented to pay, and the vendor was bound to accept payment in that mode. The buyer was therefore responsible, not at law (for courts of law have no means nor machinery for reforming contracts nor rendering conditional judgments), but in equity, either to make an equitable assignment to the vendor of his claim against Brocklehurst for an amount equivalent to the price, or to become trustee for the seller in recovering the claim against Brocklehurst. He would have no right to retain the whole of his claim against Brocklehurst while refusing to pay for the goods. The case is manifestly quite distinct from that of a mutual mistake, where a party has consumed what he did not intend to buy. If A., sends a case of wine to B., intending to sell it, but fails to communicate his



intention, and B., honestly believing it to be a gift, consumes it, there is no ground for holding B. to be responsible for the price, either in law or equity, if he be blameless for the mistake.

Mistake of one party not communicated to the other.

Where the mistake is that of one party only to the contract, and is not made known to the other, the party labouring under the mistake must bear the consequences, in the absence of any fraud or warranty. If A. and B. contract for the sale of the cargo *per* ship "Peerless," and there be two ships of that name, and A. mean one ship and B. intend the other ship, there is no contract.<sup>1</sup> But if there be but one ship "Peerless," and A. sell the cargo of that ship to B., the latter would not be permitted to excuse himself on the ground that he had in his mind the ship "Peeress," and intended to contract for a cargo by this last-named ship. Men can only bargain by mutual communication, and if A.'s proposal were unmistakeable, as if it were made in writing, and B.'s answer was an unequivocal and unconditional acceptance, B. would be bound, however clearly he might afterwards make it appear that he was *thinking* of a different vessel.

General rule of law where a party does not manifest his real intention.

For the rule of law is general, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce that other party to act upon it, he will be estopped from denying that the intention as *manifested* was his *real* intention.<sup>2</sup>

Mistake of one party known to the other.

When the mistake of one party is known to the other, then the question resolves itself generally into one of fraud, which is the subject of the next chapter. In the case just supposed of a ship "Peerless" and a ship "Peeress," there can be little doubt that if the vendor *knew* that the purchaser had a different ship in his mind from that intended by the vendor, there would be no contract, for by the rule of

<sup>1</sup> *Raffles v. Wickelhaus*, 2 H. & C. 906; 33 L. J., Ex. 160.

<sup>2</sup> *Per* Lord Wensleydale, in *Freeman v. Cooke*, 2 Ex. 654; *Doe v. Oliver*, and cases collected in notes to it, 2 Sm. L. C. 671; *Cornish v.*

*Abington*, 4 H. & N. 549, 28 L. J., Ex. 262; *Alexander v. Worman*, 6 H. & N. 100; 30 L. J., Ex. 198; *Van Toll v. South Eastern Railway Company*, 12 C. B., N. S. 75, 31 L. J., C. P. 241.

law just stated, the vendor would not be in a position to show that he had been *induced* to act by a manifestation of the buyer's intention different from his real intention. And if he not only knew the buyer's mistake, but caused it, his conduct would be fraudulent. But, as a general rule in sales, the vendor and purchaser deal at arms' length, each relying on his own skill and knowledge, and each at liberty to impose conditions or exact warranties before giving assent, and each taking upon himself all risks other than those arising from fraud, or from the causes against which he has fortified himself by exacting conditions or warranties. So that even if the vendor should know that the buyer was purchasing, for instance, cotton goods submitted to his inspection in the mistaken belief that they were made of linen, or if the purchaser should know that the vendor was selling a valuable estate under the mistaken belief that a search for mines under it had proved unsuccessful, neither party could avoid the contract made under the supposed error or mistake. The exception to this rule exists only in cases where, from the relations between the parties, some special duty is incumbent on one to make full and candid disclosure of all he knows on the subject to the other. This topic is more fully considered in the Chapter on Fraud, *post*, 312.

The mistake which will justify a party in seeking to avoid his contract must be one of fact, not of law. The universal rule is *Ignorantia juris neminem excusat*. The cases illustrating this maxim are very numerous, and only a small number of them will be found in the note.<sup>1</sup> But in *Wake v. Harrop*,<sup>1</sup> it was held, both in the Exchequer of Pleas and in the Exchequer Chamber, that where a party had specially stipulated that he was acting only as agent for another, and had signed as such agent for his absent principal named in the signature, he was at liberty to show, by way of equitable defence, that the agreement which had been drawn up

Mistake must  
be of fact, not  
law.

<sup>1</sup> *Bilbie v. Lumley*, 2 East, 471 ; 966 ; *Teed v. Johnson*, 11 Ex. 840 ;  
*Stevens v. Lynch*, 12 East, 38 ; East *Platt v. Bromage*, 24 L. J., Ex. 68 ;  
*India Company v. Tritton*, 3 B. & C. *Wake v. Harrop*, 6 H. & N. 768, 1 H.  
280 ; *Milnes v. Duncan*, 6 B. & C. & C. 202, 30 L. J., Ex. 273, 31 L. J.,  
671 ; *Stewart v. Stewart*, 6 Cl. & F. Ex. 451.

in such terms as to make him personally liable at law, was so written by mistake, that it did not express the real contract, and that he was not liable as principal. Some of the judges thought the plea a good defence, even at law, but this point not being raised, was not decided.

Failure of consideration from innocent misrepresentation of the law.

Where vendor fails to complete contract.

Where title fails after warranty by vendor.

Or even without warranty in sale of a chattel.

Where forged securities have been bought.

Purchase of shares in a projected company.

But a failure of consideration may be shown to have arisen from a misrepresentation of the law, even innocently made, and will form a valid ground for avoiding a contract.<sup>1</sup>

As early as 1797, it was held by the King's Bench to be settled law that a man who had advanced money on a contract of sale had a right to put an end to his contract for failure of consideration, and recover in an action for money had and received, if the vendor failed to comply with his entire contract.<sup>2</sup> A buyer may recover on the same ground, the price paid to the seller who has warranted title, when the goods for which the money was paid turn out to have been stolen goods, and the buyer has been compelled to deliver them up to the true owner.<sup>3</sup> And, even without such warranty, it has been said to be the undoubted right of a buyer to recover back his money paid on the ordinary purchase of a chattel, where the purchaser does not get that for which he paid;<sup>4</sup> but this subject of failure of title is more elaborately treated, *post*, Book IV., Part 2, Ch. 1, Sec. 2, on Implied Warranty of Title. And the same right exists in favour of the buyer where he has paid money for forged scrip in a railway:<sup>5</sup> or for forged bills or notes:<sup>6</sup> or for an article different from that which was described in the sale, as is shown *post*, in Book IV., Part 1, on Conditions.<sup>7</sup>

Where money was paid for shares in a projected joint-stock company, and the undertaking was abandoned, and

<sup>1</sup> *Southall v. Rigg, and Forman v. Wright*, 20 L. J., C. P. 145; 11 C. B. 481. See decision of V.-C. Wood in *Rashdall v. Ford*, L. R. 2, Eq. 750.

<sup>2</sup> *Giles v. Edwards*, 7 T. R. 81.

<sup>3</sup> *Eichholtz v. Banister*, 17 C. B., N. S. 708; 34 L. J., C. P. 105.

<sup>4</sup> *Per cur.* in *Chapman v. Speller*,

14 Q. B. 621, and 19 L. J., Q. B. 241.

<sup>5</sup> *Westropp v. Solomon*, 8 C. B. 345.

<sup>6</sup> *Jones v. Ryder*, 5 Taunt. 488; *Gurney v. Womersley*, 4 E. & B. 133, 24 L. J., Q. B. 46; *Woodland v. Fear*, 7 E. & B. 519, 26 L. J., Q. B. 202.

<sup>7</sup> See notes to *Chandeler v. Lopus*, 2 Sm. L. C. 176.

the projected company not formed, the buyer was held entitled to recover back his money as paid on a consideration which had failed.<sup>1</sup> So, also, where a buyer has paid for a bill of exchange which proves to be invalid, having been avoided by a material alteration;<sup>2</sup> or for an unstamped bill of exchange which purports to be a foreign bill, and turns out to be worthless because really a domestic bill, invalid without a stamp,<sup>3</sup> he may rescind the contract for failure of consideration.

Invalid bill.

Unstamped security.

But there is not a failure of consideration when the buyer has received that which he really intended to buy, although the thing bought should turn out worthless. Thus, where a buyer bought railway scrip, and the directors of the company subsequently repudiated it as issued without their authority; upon proof offered that the scrip was the only known scrip of the railway, and had been for several months the subject of sale and purchase in the market, held, that the buyer had got what he really intended to buy; and could not rescind the contract on the ground of a failure of consideration.<sup>4</sup>

No failure of consideration where buyer gets what he really intended to buy, even if it turn out worthless.

Where the failure of consideration is only partial, the buyer's right to rescind will depend on the question whether the contract is entire or not. Where the contract is entire, as in *Giles v. Edwards*,<sup>5</sup> and the buyer is not willing to accept a partial performance, he may reject the contract *in toto*, and recover back the price. But if he has accepted a partial performance, he cannot afterwards rescind the contract, but must seek his remedy in some other form of action. Thus, in *Harnor v. Groves*,<sup>6</sup> a purchaser of fifteen sacks of flour having, after its delivery to him, used half a sack, and then two sacks more, was held not entitled to rescind the contract, on the ground of a failure of consideration, and to return the remainder, although he had made

Partial failure of consideration.

Where contract is entire, buyer may reject the whole.

But not if he has accepted part.

*Harnor v. Groves.*<sup>1</sup> *Kempson v. Saunders*, 4 Bing. 5.<sup>2</sup> *Burchfield v. Moore*, 3 E. & B. 683; 23 L. J., Q. B. 261.<sup>3</sup> *Gompertz v. Bartlett*, 2 E. & B. 849; 23 L. J., Q. B. 65.<sup>4</sup> *Lamert v. Heath*, 15 M. & W. 487. See, also, *Lawes v. Purser*, 6 E. & B. 930, 26 L. J., Q. B. 25.<sup>5</sup> 7 T. R. 87, *ante*, 308.<sup>6</sup> 15 C. B. 667, 24 L. J., C. P. 53.

complaint of the quality as not equal to that bargained for, as soon as he had tried the first half sack. So if the buyer has paid for a certain quantity of goods, and the vendor has delivered only part, and makes default in delivering the remainder, the buyer may rescind the contract for the deficiency, and recover the price paid for the quantity deficient; for the parties in this case have, by their conduct, given an implied assent to a severance of the contract by the delivery on the one part, and the acceptance on the other, of a portion only of the goods sold. This is in its nature a *total* failure of consideration for part of the price paid; not, as in the case of the flour, a *partial* failure of the whole. This was held, in *Devaux v. Connolly*,<sup>1</sup> where the plaintiff had paid for two parcels of *terra japonica*, one of 25 tons, and the other of 150 tons, and the parcels turned out to be only 24 tons and 132½ tons respectively.

*Devaux v.  
Connolly.*

Where thing  
sold is not se-  
verable, and  
buyer has en-  
joyed part of  
the considera-  
tion.

*Taylor v. Hare.*

On the other hand, if the thing sold is such in its nature as not to be severable, and the buyer has enjoyed any part of the consideration for which the price was paid, he is no longer at liberty to rescind the contract. Thus, in *Taylor v. Hare*,<sup>2</sup> where the plaintiff purchased from the defendant the use of a patent right, and had made use of it for some years, and then discovered the defendant not to be the inventor, it was held that he could not maintain an action for rescission of the contract and return of the price, on the ground of failure of consideration; and this case was followed by the King's Bench half a century later in *Lawes v. Purser*,<sup>3</sup> where the facts as pleaded were almost identical with those in *Taylor v. Hare*.

*Lawes v. Pur-  
ser.*

*Chanter v.  
Leese.*

In *Chanter v. Leese*,<sup>4</sup> the Exchequer Chamber, in a case of sale of six patents for one consideration, five of which were valid, and one void, held, that there had been an entire failure of consideration, on the ground that the money payable had not been apportioned by the contract to the different parts of the consideration, and the patents had not been enjoyed in part by the buyer. "We see, therefore,

<sup>1</sup> 8 C. B. 640.

<sup>2</sup> 1 B. & P., N. R. 260.

<sup>3</sup> 6 E. & B. 930; 26 L. J., Q. B. 25.

<sup>4</sup> 5 M. & W. 698.

that the consideration is entire, and the payment agreed to be made by the defendants is entire, and we see also a failure of the consideration, which being entire, *by failing partially, fails entirely*; and it follows that no action can be maintained for the money." The Court further stated that even if the five patents had been enjoyed, they were of opinion that no action could be maintained *on the agreement*, though possibly a remedy might exist in some other form of action.

## CHAPTER II.

### FRAUD.

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## SECTION I.—IN GENERAL.

FRAUD renders all contracts *voidable ab initio* both at law and in equity. No man is bound by a bargain into which he has been deceived by a fraud, because assent is necessary to a valid contract, and there is no real assent where fraud

Fraud renders contracts voidable.



and deception have been used as instruments to control the will and influence the assent.

Definitions of fraud.

Although fraud has been said to be "every kind of artifice employed by one person for the purpose of deceiving another," courts and law-givers have alike wisely refrained from any attempt to define with exactness what constitutes a fraud, it being so subtle in its nature, and so Protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade.

The Roman juriconsults attempted definitions, two of which are here given: "Dolum malum SERVIVS quidem ita definit, machinationem quandam alterius decipiendi causa, cum aliud simulatur, et aliud agitur. LABEO autem, posse et sine simulatione id agi ut quis circumveniat: posse et sine dolo malo aliud agi, aliud simulari; sicuti faciunt qui per ejus modi dissimulationem deserviant, et tuentur vel sua vel aliena: Itaque, ipse sic definit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumvenendum, fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est." Dig. l. iv., t. 3, l. 1, § 2.

The Civil Code of France, without giving a definition, provides, in Art. 1116: "Fraud is a ground for avoiding a contract when the devices (*les manœuvres*) practised by one of the parties are such as to make it evident that without these devices the other party would not have contracted."

No fraud unless party is deceived.

However difficult it may be to define what fraud is in all cases, it is easy to point out some of the elements which must necessarily exist before a party can be said at common law to have been defrauded. In the first place it is essential that the means used should be successful in *deceiving*. However false and dishonest the artifices or contrivances may be by which one man may attempt to induce another to contract, they do not constitute a fraud if that other knows the truth, and sees through the artifices or devices. *Haud enim decipitur qui scit se decipi*. If a contract is made under such circumstances, the inducement or motive for making it is *ex concessis*, not the false or fraudulent repre-

sentations, which are not believed, but some other independent motive.

Next, it is now well settled that there can be no fraud without dishonest intention, no such fraud as was formerly termed a *legal fraud*. Therefore, however false may be the representation of one party to another to induce him to make a contract, there is no ground for avoiding it *as obtained by fraud*, if the party making the representation honestly believed it to be true; although other remedies are sometimes available to the deceived party.

No fraud without dishonest intention : no *legal fraud* in sales.

Lastly, there must be damage to the party deceived, even when there is a knowingly false representation before a right of action can arise. "Fraud without damage, or damage without fraud, gives no cause of action," was the maxim laid down by Croke, J., in 3 Bulst. 95, and quoted with approval by Buller, J., in the great leading case of *Pasley v. Freeman*,<sup>1</sup> to which more particular attention will presently be drawn.

Fraud without damage gives no right of action.

The whole doctrine on the subject was very much discussed in the House of Lords, in the celebrated case of *Atwood v. Small*;<sup>2</sup> and in Lord Brougham's opinion, the principles unanimously conceded to be true by their lordships are carefully laid down.<sup>3</sup>

*Atwood v. Small*.

The mistaken belief as to facts may be created by active means, as by fraudulent concealment or knowingly false representation; or passively, by mere silence when it is a duty to speak. But it is only where a party is under some pledge or obligation to reveal facts to another that mere silence will be considered as a means of deception. In general, where an article is offered for sale, and is open to the inspection of the purchaser, the common law does not permit the latter to complain that the defects, if any, of the article are not pointed out to him. The rules are *Caveat emptor* and *Simplex commendatio non obligat*. The buyer is always anxious to buy as cheaply as he can, and is suffi-

Mistaken belief may be caused actively or passively.

*Caveat emptor* is general rule.

<sup>1</sup> 3 T. R. 51; 2 Sm. L. C. 71.

Lord Wensleydale, in *Smith v. Kay*,

<sup>2</sup> 6 Cl. & F. 232.

7 H. of L. C., at p. 774.

<sup>3</sup> *Ibid.* pp. 443-7. See, also, *per*

Buyer can exact warranty if unwilling to deal on the general rule.

ciently prone to find imaginary fault in order to get a good bargain, and the vendor is equally at liberty to praise his merchandise in order to enhance its value if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspecting it, and no means are used for hiding the defects. If the buyer is unwilling to bargain on these terms, he can protect himself against his own want of care or skill by requiring from the vendor a warranty of such matters as he is unwilling to take the risk of on himself. But the use of any device by the vendor to induce the buyer to omit inquiry or examination into the defects of the thing sold is as much a fraud as an active concealment by the vendor himself.

Action of deceit on *tort* may exist in favour of third persons, not parties to the contract.

The authorities on which the foregoing preliminary remarks are based will be referred to in the detailed investigation which it is proposed to make of the subject, divided, for convenience, into three parts; 1st, fraud on the vendor; 2nd, on the purchaser; 3rd, on creditors, including the law on Bills of Sale. But it will be useful first to point out that a man may make himself liable in an *action founded on tort* for fraud or deceit, brought by parties with whom he has not contracted, by a stranger, by any one of the public at large who may be injured by his deceit.

Langridge v. Levy.

The case usually cited as the leading one on this point is *Langridge v. Levy*,<sup>1</sup> where the defendant offered for sale a gun, on which he put a ticket in these terms: "Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty, George IV.: cost 60 guineas; only 25 guineas." The gun was sold to the plaintiff's father, who told the defendant that it was wanted "for the use of himself and his sons." It was warranted to be a good, safe, and secure gun, and to have been made by Nock. The gun burst in the hands of the plaintiff, injuring him severely, and it was proven not to be of Nock's make. Parke, B., delivered the judgment of the Court, after time taken for consideration. He said: "If the instrument in question

<sup>1</sup> 2 M. & W. 519; in error, 4 M. & W. 329.

\* \* \* had been delivered by the defendant *to the plaintiff* for the purpose of being used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant's knowledge*, and the plaintiff had acted upon the faith of its being true, and had received damage thereby, then there is no question but that an action would have lain upon the principle of a numerous class of cases, of which the leading one is that of *Pasley v. Freeman*,<sup>1</sup> which principle is that *a mere naked falsehood is not enough to give a right of action*: but if it be a *falsehood told with the intention that it should be acted upon by the party injured, and that act must produce damage to him*; if, instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, *for the purpose of being delivered to and then used by the plaintiff*, the like false representation being knowingly made to the *intermediate person to be communicated* to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have his remedy for the deceit."

*Pasley v. Freeman.*

In the Exchequer Chamber, the judgment was affirmed on the ground "that as there is fraud; and damage the result of that fraud; not from an act remote and consequential, but one contemplated by the defendant at the time, as one of its results, the party guilty of the fraud is responsible to the party injured."

But no action can be maintained in such cases growing out of the contract, except by parties or proxies, as was held by the same and other Courts almost immediately afterwards.<sup>2</sup>

But no such action can be maintained on contract.

The distinction was clearly illustrated in a case in the Queen's Bench, where there were two counts in the declaration, the first, on contract, which was held bad, the second, in *tort*, which was sustained. The fraud charged was issu-

*Gerhard v. Bates.*

<sup>1</sup> 3 T. R. 51, and 2 Sm. L. C. 71, where all the authorities are collected.

& W. 109; *Longmeid v. Holiday*, 6 Ex. 761; *Howard v. Shepherd*, 9 C. B. 297; 19 L. J., C. P. 249.

<sup>2</sup> *Winterbottom v. Wright*, 10 M.

ing to the public a false and fraudulent prospectus for a company, whereby the plaintiff was deceived into taking shares.<sup>1</sup>

Any one of the public, if injured, may bring an action in *tort* for deceit, where fraudulent representations are published.

Case decided in New York in action for deceit.

This principle, that the liability in an action of *tort* may be enforced against a party guilty of fraudulent representations publicly given out and intended to deceive the public at large, by any person who has suffered damages in consequence of them, has since been frequently enforced by the Courts.<sup>2</sup>

The following action was held to be maintainable in the State of New York. A. had agreed to bring certain animals for sale and delivery to B., at a specified place. A third person, desirous of making a sale to B., falsely represented to him that A. had abandoned all intention of fulfilling his contract, and thereby induced B. to supply himself by buying from that third person. A. was put to expense and loss of time in bringing the animals to the appointed place and otherwise disposing of them. In an action for damages for the deceit against the third person by A., it was not only held that he was entitled to recover, but that it was no defence to the action that the contract between A. and B. was one that could not have been enforced.<sup>3</sup>

We will now revert to the subject of fraud as specially applied in cases of sale.

#### SECTION II.—FRAUD ON THE VENDOR.

Effect of fraud on the vendor in passing property.

It is not until quite recently that it was finally settled whether the property in goods passes by a sale which the vendor has been fraudulently induced to make. The recent cases of *Stevenson v. Newnham*,<sup>4</sup> in *Cam. Scacc.*, and of

<sup>1</sup> *Gerhard v. Bates*, 2 E. & B. 476, 22 L. J., Q. B. 364.

<sup>2</sup> *Scott v. Dixon*, reported in note, 29 L. J., Ex. 62; decided by the Q. B. in 1859; *Bagshaw v. Seymour*, in note, 29 L. J., Ex. 62, and 18 C. B. 903; *Bedford v. Bagshaw*, 4 H. & N. 538; 29 L. J., Ex. 59. See, also, *North Brunswick Railway*

*Company v. Conybeare*, 9 H. of L. 712; *Western Bank of Scotland v. Addie*, L. R. 1, Scotch Ap. 145; *Henderson v. Lacon*, L. R. 5, Eq. 249 (V.-C. W.)

<sup>3</sup> *Benton v. Pratt*, 2 Wend. 385.

<sup>4</sup> 13 C. B. 285, and 22 L. J., C. P. 110.

Pease *v.* Gloahec,<sup>1</sup> in the Privy Council, confirming the principles asserted by the Exchequer in *Kingsford v. Merry*,<sup>2</sup> taken in connection with the decision of the House of Lords in *Oakes v. Turquand*,<sup>3</sup> leave no room for further question. By the rules established in these cases, whenever goods are obtained from their owner by fraud, we must distinguish whether the facts show a *sale* to the party guilty of the fraud, or a mere delivery of the goods into his *possession* induced by fraudulent devices on his part. In other words, we must ask whether the owner intended to transfer both the property in, and the possession of, the goods to the person guilty of the fraud, or to deliver nothing more than the bare possession. In the former case, there is a contract of sale, however fraudulent the device, and the property passes: but not in the latter case.

Depends on vendor's intention to transfer possession and ownership, or possession only.

This contract is *voidable* at the election of the vendor, not void *ab initio*. It follows, therefore, that the vendor may affirm and enforce it, or may rescind it. He may sue in assumpsit for the price, and this affirms the contract, or he may sue in trover for the goods or their value, and this disaffirms it. But in the mean time, and until he elects, *if his vendee transfer the goods in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person.* If, on the contrary, the intention of the vendor was not to pass the property, but merely to part with the *possession* of the goods, there is no *sale*, and he who obtains such *possession* by fraud can convey no property in them to any third person, however innocent, for no property has passed to himself from the true owner.

Contract not void *ab initio*, but voidable.

Rights of bona fide third persons protected, if acquired before avoidance.

Not protected where vendor only transferred possession.

To these common-law rules, there is one statutory exception. By the 7 & 8 Geo. IV. c. 29, s. 57, re-enacted 24 & 25 Vict. c. 96, s. 100, where the fraud by which the goods are obtained from the vendor is such as to enable him to succeed in prosecuting to conviction the fraudulent buyer as

Exception, where true owner prosecutes to conviction a person guilty of false pretences.

<sup>1</sup> L. R. 1, Priv. C. 220; 3 Moore, P. C., N. S. 556.

<sup>2</sup> 11 Ex. 577, and 25 L. J., Ex. 166.

<sup>3</sup> L. R. 2, Eng. Ap. 325.

having been guilty of obtaining the goods by false and fraudulent pretences, he will be entitled, after such conviction, to recover his goods, even from a third person, who is a *bona fide* purchaser from the party committing the fraud. The cases<sup>1</sup> under this statute have already been reviewed, *ante*, Book I., Part 1, Ch. 2, pp. 7-8.

Earlier cases  
reviewed.

The early cases are not universally in accord with the principles above stated, and in more than one of them the property was held not to have passed, although it was very plainly the intention of the vendor to transfer the title, as well as the possession, of the goods.

Martin v.  
Pewtress.

In *Martin v. Pewtress*,<sup>2</sup> in 1769, Lord Mansfield held at *Nisi Prius*, and the decision was confirmed in *Banco*, that no property in goods had passed, that "the property was not altered," where by a fraudulent scheme the insolvent debtor bought goods from third persons and conveyed them to the defendants as favoured creditors; although it was beyond question in the case, that in the purchase by the debtor, as well as in the reconveyance to the favoured creditors, the intention had been to pass both the property and possession of the goods. The *decision* in the case was clearly right, however, the defendants not being *bona fide* purchasers, but participators in the fraud.

Read v. Hut-  
chinson.

In 1813, Lord Ellenborough, in the case of *Read v. Hutchinson*,<sup>3</sup> said, in reference to the defendant's having obtained merchandise in exchange for an acceptance which he knew to be worthless when he passed it, "The defendant is not the purchaser of the goods, but a person who has tortiously got possession of them. If he knew at the time that the bill was worth nothing, I think he is answerable to the plaintiff to the amount of the value of the goods, but this (*assumpsit*) is not the proper remedy. The plaintiff should have brought *trover* or an action of deceit." This case was between the parties to the contract, and the deci-

<sup>1</sup> See *Parker v. Patrick*, 5 T. R. 495; *Scattergood v. Sylvester*, 15 Q. B. 506, and 19 L. J., Q. B. 447.  
175; *Gladstone v. Hadwen*, 1 M. & S. 517; *Taylor v. Plumer*, 3 M. & S. 562; *Peer v. Humphrey*, 2 A. & E.  
<sup>2</sup> 4 Burr. 2478.  
<sup>3</sup> 3 Camp. 352.

sion is no doubt right, but the *dictum* that the defendant was not the purchaser is not in accordance with the modern rule, for the plaintiff *intended* to transfer to him both the property and the possession.

In the same year, his Lordship also delivered the judgment of the King's Bench in *Gladstone v. Hadwen*.<sup>1</sup> One Sill obtained certain bills of exchange from the defendant in consideration of a transfer to him of 250 tierces of coffee, in which Sill represented himself to have a special property as security for advances. This was a falsehood, the coffee belonging to another person, and Sill having no property in it. Sill remitted the bills to London on 25th October, and on the 26th determined to stop payment, and repenting his conduct, immediately sent to London for the bills, got them back, and returned them to defendant, but in the mean time he had committed an act of bankruptcy. The plaintiffs, his assignees, brought trover for the bills. Lord Ellenborough said: "The question is whether Sill and Co. had such a property in the bills of exchange as passed to their assignees. We are of opinion they had not. In this case bills were obtained by the bankrupt Sill under a false pretence of giving the defendant an ample security by delegating to him a right to hold coffee, whereas the coffee was the property of another person, over which Sill had no control or lien, or if he had, had before pledged it in favour of another creditor. The bills therefore appear to have been obtained by a criminal fraud." This case is not distinguishable from *Load v. Green*,<sup>2</sup> in which the decision was the same; but it will be seen, when we come to examine it, that the *ratio decidendi* in *Load v. Green* was exactly the reverse, for it is a leading case to show that the property *does* pass in such cases, and that the true owner *gets it back* by disaffirming and avoiding the contract into which he was deluded by fraud.

In 1816, in *Noble v. Adams*,<sup>3</sup> the facts were that the plaintiff was a trader in London, and was in embarrassed

<sup>1</sup> 1 M. & S. 517.

<sup>2</sup> 15 M. & W. 216.

<sup>3</sup> 7 Taunt. 59.



circumstances. He held an acceptance of his own draft on Outhwaite and Co., whom he knew to be insolvent. Under these circumstances, he determined to go to Scotland, and there buy goods to be used for the purpose of escaping from his difficulties if possible, and in pursuance of this plan he purchased goods in Glasgow from Cross and Co., giving them the worthless acceptance in part payment of the price, and for the remainder his own acceptance of a bill drawn by one of his creditors, to whom he had explained his scheme. The goods were delivered to Noble, and came into possession of the defendant, as wharfinger, by Noble's orders, but the wharfinger, on being notified of the facts, and indemnified by the vendors, refused to deliver the goods to Noble, who thereupon brought trover. Gibbs, C. J., left it to the jury whether Cross and Co. had merely made an improvident sale, or whether Noble had fraudulently obtained the goods.

He told the jury that if they "thought that the plaintiff went down to Scotland, having formed a deliberate plan to put off bad bills for valuable merchandise, knowing the goods would never be paid for, and intending then to abscond with the goods, or to throw them into an immediate bankruptcy, or to pass them over to a particularly favoured creditor, the plaintiff had been guilty of a fraud, and *the sale would not change the property*; but if the plaintiff only meant to give [to] these bills and [to] himself by these bills more credit than they deserved, but intended to continue to carry on his business, and to try to pay for the goods at some time or other, if he could, that was not such a fraud as would vitiate the sale." This ruling was held by the Court to be correct, "under the guards with which Gibbs, C. J., had stated the proposition;" but the Court were of opinion that the evidence was insufficient to sustain the verdict of the jury, because there was "no proof of what passed between Cross and the plaintiff, or by what practices the latter obtained the goods, without which it cannot be known whether or not the means which the plaintiff used were such as to fix him with the offence of obtaining the goods under false pretences. That offence would *vacate this*

*transaction*, which, on the *outside of it*, was a sale." There can be no doubt on the reported facts, that in this case there was a real intention on the part of the vendor to transfer both the property and the possession, but the case was argued and decided less with reference to this principle than to a supposed distinction suggested in other cases between frauds that are within the statutes, which punish the offence of obtaining goods under false pretences, and frauds not within those statutes.

In *Fuller v. Abrahams*<sup>1</sup> it was held that a fraudulent purchaser at an auction could not maintain trover against the auctioneer for refusal to deliver the goods purchased, the vendor having disaffirmed the sale before delivery.

*Fuller v.  
Abrahams.*

In 1823 the subject again came before the King's Bench in the case of *Earl of Bristol v. Wilsmore*.<sup>2</sup> There the buyer had given to the vendor's servant in payment for some sheep sold for cash, a cheque, which the buyer represented to be as good as money. He then immediately executed a warrant of attorney, by virtue of which judgment was entered and execution issued in favour of his sister-in-law, and the sheep were taken under the execution on the very day of the purchase. There were no funds in bank to the credit of the buyer, who had overdrawn his account some months before, and who absconded after this transaction was completed, and was not afterwards heard of.

*Earl of Bristol  
v. Wilsmore.*

The Court held that it was a question of fact for the jury whether the buyer had obtained possession of the sheep with a *preconceived design of not paying for them*, and if that were the case, it would be such a fraud as would vitiate the sale, and *prevent the property from passing to him*.

This case was decided on the authority of *Read v. Hutchinson*, *Noble v. Adams*, and *Rex v. Jackson*,<sup>1</sup> this last being a case where a conviction for obtaining goods on false pretences, under the 30 Geo. II. c. 24, was upheld on proof that the accused had obtained the goods by giving in

*Rex v. Jackson.*

<sup>1</sup> 3 B. & B. 116.

<sup>2</sup> 1 B. & C. 514.

<sup>3</sup> 3 Camp. 370. See, also, *Hawse v. Crowe*, R. & M. 414.

payment a cheque on a banker with whom he had no cash, and which he knew would not be paid.

*Duff v. Budd.*

*Duff v. Budd*<sup>1</sup> was an action by a vendor against a common carrier to whom he had delivered goods, to be forwarded to Mr. James Parker, High Street, Oxford. The goods had been ordered by an unknown person, and there was no *James Parker* in that street, but there was a *William Parker*, a solvent tradesman, who refused the parcel. Soon after, a person came to the defendant's office and claimed the parcel as his own, and on paying the carriage it was delivered to him. He had on previous occasions received goods from the same office, directed to Mr. Parker, Oxford, to be left till called for. One of the grounds of defence taken by Pell, Serjeant, was that the property in the goods had passed out of the plaintiff to the consignee. Dallas, C. J., and Burrough, J., did not notice the point, but Park, J., said that the ground taken did "not apply to a case bottomed in fraud in which there had been no sale," and Richardson, J., said, "there was clearly a property in the plaintiffs entitling them to sue, as they had been imposed on by a gross fraud."

*Stephenson v. Hart.*

A few years later, a case almost identical in its features came before the same Court. *Stephenson v. Hart*<sup>2</sup> was, again, an action by a vendor against a common carrier. A purchaser bought goods from the plaintiff, and ordered them to be sent to J. West, 27, Great Winchester Street, London, and gave a spurious bill of exchange in payment. The vendor delivered the goods to the carrier to be forwarded to the above address. No person was found at the address, but a few days after the carrier received a letter signed "J. West," stating that a box had been addressed to him by mistake to Great Winchester Street, and asking that it should be forwarded to him at the Pea Hen, a public-house at St. Alban's. The box was so forwarded, and the person who had sent for it, said it was for him, and stated its contents before opening it, thus showing that *the box had*

<sup>1</sup> 3 B. & B. 177.

<sup>2</sup> 4 Bing. 476.

*reached the person to whom it was addressed.* One ground of defence, again, was that upon the delivery to the carriers the property ceased to be in the vendor, and was vested in the consignee. Park, J., held that the property had not passed, because West had never meant to pay for the goods, and the true question was "not what the *seller* meant to do, but what are the intentions of the *customer*. Did *he* mean to buy?" Burrough, J., said that the property had never passed out of the consignor, giving no reason except that the transaction of West was a gross fraud; but Gaselee, J., doubted strongly whether trover could lie when the carrier had delivered the goods to the person to whom they had been really consigned by the vendor.

It is submitted that both these cases against the carriers are very doubtful authorities under the modern doctrine, which clearly holds that the property does pass, when the *vendor* intends it to pass, however fraudulent the device of the buyer to induce that intention. Doubt submitted as to these two cases.

In *Irving v. Motley*,<sup>1</sup> the facts were, that one Dunn and a firm of Wallington and Co. had been engaged in a series of transactions, in which Dunn, as agent, purchased for them goods, on credit, and immediately resold them at a loss, the purpose being to raise money for the business of Wallington and Co. Dunn was also an agent for the defendant Motley, who was entirely innocent of any knowledge of, or participation in, the transactions of Wallington and Co. Under these circumstances, Dunn, in behalf of Wallington and Co., applied to the defendant for an advance, which the latter agreed to make if secured by a consignment of goods. Thereupon Dunn, as agent of Wallington and Co., bought a parcel of wool from the plaintiff, on credit, and at once transferred it to Motley, as security for the advance. Wallington and Co. became bankrupt a few days after this transaction, and the plaintiffs brought trover against Motley for the wool. A verdict was given for the plaintiff, the jury finding that the transaction was fraudulent, and that Motley *Irving v. Motley.*

<sup>1</sup> 7 Bing. 543.

knew nothing of the fraud, but that Dunn was his agent as well as that of Wallington and Co. The Court refused to set aside the verdict, but the judges were not in accord as to the grounds. Tindal, C. J., said: "The ground set up here is that there was an *acting and an appearance of purchase* given to the transfer of these goods, which in truth and justice it did not really possess. Whether Dunn, as the agent of Wallington and Co., went into the market and got these goods into his possession, under such representation as may amount to obtaining goods under false pretences, it is not necessary to say, but it comes very near that case: it is under circumstances that place him and Messrs. Wallington in the light of conspirators to obtain possession of the goods. \* \* \* At all events, it was left to a jury of merchants, and though they have acquitted the defendants of fraud, yet they involve them in the legal consequences, as it was a fraud *committed by their agent with a view to benefit them.*" Park, J., agreed with the Chief Justice, but he expressed anxiety to explain *Noble v. Adams*,<sup>1</sup> saying, that the Court did not hold, nor mean to hold in that case, that obtaining goods under false pretences was the *only* ground upon which the transaction could be held void. Gaselee, J., was careful to confine the doctrine of the case before the Court, to the special circumstances, saying: that it was "maintainable against the defendants, because they had constituted Dunn their agent, for the purpose of securing themselves, by getting a consignment of wool made to them from Wallington and Co.; and their agent having thought fit to procure that consignment by means of what the jury have found to be a fraud, however innocently the defendants may have acted, they cannot take any benefit from the misconduct of that agent." Alderson, J., however, thought that the case was confused by treating it as one of principal and agent; that Dunn and Wallington were principals in a conspiracy to get the goods from the plaintiff, and therefore *no property passed out of Messrs. Irving.*

<sup>1</sup> 7 Taunt. 59.

In *Ferguson v. Carrington*,<sup>1</sup> goods were sold to defendant on credit, whereupon he immediately resold them at lower prices, and the vendor brought *assumpsit* for the price before the maturity of the credit, on the ground that the defendant had manifestly purchased with the preconceived design of not paying for them. Lord Tenterden, C. J., nonsuited the plaintiff, on the ground that by bringing an action on the contract, he affirmed it, and was therefore bound to wait till the end of the credit, but that "if the defendant had obtained the goods with the *preconceived design of not paying for them, no property passed to him* by the contract of sale, and it was competent to the plaintiff to bring trover, and treat the contract as a nullity, and the defendant not as a purchaser of the goods, but as a person who had obtained tortious possession of them." Parke, J., concurred in this view.

*Ferguson v.  
Carrington.*

It should not be overlooked that in this, as in several of the preceding cases, the action was between the true owner and the fraudulent buyer; that the language of the judges was intended to apply only to the case before them, and was not therefore so guarded in relation to the effect of the contract in transferring the property, as it would doubtless have been if the rights of innocent third parties had been in question.

Observations on  
this case.

In *Load v. Green*,<sup>2</sup> the buyer purchased the goods on the 1st July, they were delivered on the 4th, and a *fiat* in bankruptcy issued on the 8th. It was uncertain whether the act of bankruptcy had been committed prior to the purchase. The jury found that the buyer purchased with the fraudulent intention of not paying for the goods; and it was held, that even assuming the act of bankruptcy to have been committed after the purchase, "the plaintiff had a right to disaffirm it, to *revest* the property in the goods, and recover their value in trover against the bankrupt."

*Load v. Green.*

In the early case of *Parker v. Patrick*,<sup>3</sup> the King's Bench

*Parker v.  
Patrick.*

<sup>1</sup> B. & C. 59.

<sup>2</sup> 15 M. & W. 216.

<sup>3</sup> 5 T. R. 175.

held, in 1798, that where goods had been obtained on false pretences, and *the guilty party had been convicted*, the title of the original owner could not prevail against the rights of a pawnbroker, who had made *bond fide* advances on them to the fraudulent possessor. This case has been much questioned, but the only difficulty in it may be overcome by adopting the suggestion made by Parke, B., in *Load v. Green*, namely, that the false pretences were successful in causing the owner to make a *sale* of the goods, in which event an innocent third person would be entitled to hold them against him. Several of the judges made remarks on the case, in *White v. Garden*,<sup>1</sup> and it was cited by the Court as one of the acknowledged authorities on this subject in *Stevenson v. Newnham*.<sup>2</sup>

Powell v.  
Hoyland.

In *Powell v. Hoyland*,<sup>3</sup> decided in 1851, Parke, B., expressed a strong impression that trespass would not lie for goods obtained by fraud, "because fraud does transfer the property, though liable to be divested by the person deceived, if he chooses to consider the property as not having vested."

White v.  
Garden.

In *White v. Garden*,<sup>1</sup> the innocent purchaser from a fraudulent vendee was protected against the vendor, and all the judges expressed approval of the opinion given by Parke, B., in *Load v. Green*.

Stevenson v.  
Newnham.

In *Stevenson v. Newnham*,<sup>2</sup> in 1853, Parke, B., again gave the unanimous opinion of the Exchequer Chamber, that the effect of fraud "is not absolutely to avoid the contract or transaction which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The *fraud only gives a right to rescind*. In the first instance, *the property passes* in the subject-matter. An innocent purchaser from the fraudulent possessor may acquire an indisputable title to it, though it is *voidable* between the original parties."

This decision was not impugned, when the Exchequer

<sup>1</sup> 20 L. J., C. P. 167, and 10 C. B. 110.

919.

<sup>2</sup> 6 Ex. 67—72.

<sup>3</sup> 13 C. B. 285, and 22 L. J., C. P.

Chamber, in *Kingsford v. Merry*,<sup>1</sup> in 1856, held that the defendant, an innocent third person, who had made advances on goods, could not maintain a defence against the plaintiffs, the true owners. In that case, the party obtaining the advances had procured the delivery of the goods to himself by falsely representing that a sale had been made to him by the owner's agents, the Court saying on these facts that the parties "never did stand in the relation of vendor and vendee of the goods, and there was no contract between them which the plaintiffs might either affirm or disaffirm." This decision reversed the judgment of the Exchequer of Pleas,<sup>2</sup> but it was explained by Bramwell, B., in *Higsons v. Burton*, *infra*, and by Lord Chelmsford, in *Pease v. Gloahec*, *infra*, that this was only by reason of a changed state of facts, and that the principles on which both Courts proceeded were really the same.

*Kingsford v. Merry.*

In *Higsons v. Burton*,<sup>3</sup> a discharged clerk of one of plaintiffs' customers fraudulently obtained from plaintiffs goods in the name and as being for the account of the customer, and sent them at once to defendant, an auctioneer, for sale. Held, that there had been no sale, but a mere obtaining of goods from plaintiff on false pretences, that no property passed, and that defendant was liable in trover. Plainly in this case the plaintiffs, although delivering the possession, had no intention of transferring the property to the clerk, and the latter, therefore, could transfer none to the auctioneer.

*Higsons v. Burton.*

In *Hardman v. Booth*,<sup>4</sup> the plaintiff went to the premises of Gandell and Co., a firm not previously known to him, but of high credit, to make sale of goods, and was there received by Edward Gandell, a clerk, who passed himself off as a member of the firm, and ordered goods, which were supplied, but which Edward Gandell sent to the premises of Gandell and Todd, in which he was a partner. The plaintiff knew nothing of this last-named firm, and thought he

*Hardman v. Booth.*

<sup>1</sup> 1 H. & N. 503, and 26 L. J., Ex. 83.

<sup>2</sup> 26 L. J., Ex. 342.

<sup>4</sup> 1 H. & C. 803; 32 L. J., Ex. 105.

<sup>3</sup> 11 Ex. 577, and 25 L. J., Ex. 166.



was selling to "Gandell and Co." The goods were pledged by Gandell and Todd with the defendant, an auctioneer, who made *bonâ fide* advances on them. The plaintiff's action was trover, and was maintained, all the judges holding that there had been no contract, that the property had not passed out of the plaintiff, and that the defendant was therefore liable for the conversion.

Pease v.  
Gloahec.

In 1866, *Pease v. Gloahec*,<sup>1</sup> on appeal from the Admiralty Court, was twice argued by very able counsel. After advisement, the Privy Council, composed of Lord Chelmsford, Knight Bruce, and Turner, Lords JJ., Sir J. T. Coleridge, and Sir E. V. Williams, delivered a unanimous decision.

The principle laid down in *Kingsford v. Merry*, as stated by the Court of Exchequer (and not affected by the reversal of their judgment in the Exchequer Chamber), was affirmed to be the true rule of law, viz.: "Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

It is a fraud  
on vendor to  
prevent others  
from bidding at  
auction sale.

It is a fraud on the vendor to prevent other persons from bidding at an auction of the goods sold, and where the buyer had, by an address to the company assembled at the auction, persuaded them that he had been wronged by the vendor, and that they ought not to bid against the buyer, the purchase by him was held to be fraudulent and void.<sup>2</sup>

Where vendor  
is induced by  
fraud to sell to  
an insolvent  
third person.

Where the fraud on the vendor consists in the defendant's inducing him by false representations to sell goods to an insolvent third person, and then obtaining the goods from

<sup>1</sup> L. R. 1, Priv. C. 220; 3 Moore, App. 325.

P. C. N. S. 566. And see *Oakes v.*

<sup>2</sup> *Fuller v. Abrahams*, 3 B. & B. 116.

that third person, the price may be recovered from the defendant as though he had bought directly in his own name, for his possession of the vendor's goods unaccounted for implies a contract to pay for them, and he cannot account for his possession, save through his own fraud, which he is not permitted to set up in defence.<sup>1</sup> (Sed quære?)

In *Biddle v. Levy*,<sup>2</sup> the defendant told plaintiff that he was about to retire from business in favour of his son, who was a youth of seventeen years of age, but would watch over him. He then introduced his son to the plaintiffs, who sold to the son goods to the value of 800*l*. The representations were false and fraudulent, and Gibbs, C. J., held an action *for goods sold and delivered* to be maintainable against the father. *Biddle v. Levy.*

Where, however, the fraud on the vendor is effected by means of assurances given by a third person of the buyer's solvency and ability, the proof that such assurances were made must be in writing, as required by the 6th section of Lord Tenterden's Act (9 Geo. IV. c. 14), which provides "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain *credit*, money, or *goods* upon,"<sup>3</sup> unless such representation or assurance be made in writing, signed by the party to be charged therewith." Fraud by means of false representations of buyer's solvency by third person must be proven by written evidence.

The construction of this section was much debated in the case of *Lyde v. Barnard*,<sup>4</sup> in which the judges of the Exchequer were equally divided, but the case had no reference to a sale of goods. In *Haslock v. Ferguson*,<sup>4</sup> the action was against the defendant for an alleged fraudulent declaration to the plaintiff that one Barnes was of fair *Lyde v. Barnard.*  
*Haslock v. Ferguson.*

<sup>1</sup> *Hill v. Perrott*, 3 Taunt. 274.

<sup>2</sup> 1 Stark. 20.

<sup>3</sup> This word "upon" is perhaps a mistake for "thereupon:" perhaps the words ought to be "money or

goods upon credit." See remarks of the judges in *Lyde v. Barnard*, 1 M. & W. 101.

<sup>4</sup> 7 A. & E. 86.

character, by which representation the plaintiff was induced to sell goods to Barnes, the proceeds of which were partly applied to the benefit of the defendant. The Court held that parol evidence of the alleged representation was inadmissible, overruling a distinction which Sir John Campbell, for the plaintiff, attempted to support, "that the gist of the action was not the misrepresentation of character, but the wrongful acquisition of property by the defendant."

*Devaux v. Steinkeller.*  
Representation by partner of credit of his firm.

In *Devaux v. Steinkeller*,<sup>1</sup> it was held that a representation made by a partner of the credit of his firm was a representation of the credit of "another person" within the meaning of this statute; and in *Wade v. Tatton*,<sup>2</sup> in the Exchequer Chamber, that where there were both verbal and written representations, an action will lie if the written representations were a material part of the inducement to give credit.

False representations by buyer in order to get goods cheaper.

The effect of concealment or false representations made by the buyer with a view to induce the owner to take less for his goods than he would otherwise have done, does not appear to have been often considered by the Courts. Chancellor Kent carries the doctrine on the subject of fraud much further than could be shown to be maintainable by decided cases, and states it in broader terms than are deemed tenable by the later editors of his Commentaries.<sup>3</sup> Under the head of "Mutual Disclosures," he lays down, in relation to sales, the proposition that, "as a general rule, *each party* is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation."

In equity, purchaser not bound to acquaint vendor with latent advantages of thing sold.

The courts of equity even fall far short of this principle, and both Lord Thurlow and Lord Eldon held that a *purchaser* was not bound to acquaint the vendor with any latent advantage in the estate. In *Fox v. Mackreth*,<sup>4</sup> Lord

<sup>1</sup> 6 Bing., N. C. 84.

<sup>2</sup> 25 L. J., C. P. 240. See, also, *Swan v. Phillips*, 8 Ad. & E. 745; *Turnley v. McGregor*, 6 M. & S. 46;

*Pauley v. Freeman*, 3 T. R. 51.

<sup>3</sup> 2 Kent, 641, 11th ed.

<sup>4</sup> 2 Bro. C. C. 420.

Thurlow was of opinion that the purchaser was not bound to disclose to the seller the existence of a mine on the land, of which he knew the seller was ignorant, and that a court of equity could not set aside the sale, though the estate was purchased for a price of which the mine formed no ingredient. Lord Eldon approved this ruling in *Turner v. Harvey*.<sup>1</sup> But in the latter case Lord Eldon also held that if the least word be dropped by the purchaser to *mislead* the vendor in such a case, the latter will be relieved; and his Lordship accordingly decided that the agreement for the sale in that case should be given up to be cancelled. The facts were that the purchaser of a reversionary interest had concealed from the seller that a death had occurred by which the value of the reversionary interest was materially increased.

*Fox v. Mackreth.*

*Turner v. Harvey.*

But purchaser must not *mislead* vendor in such a case.

At common law, the only case decided in banco, that has been found on this point is *Vernon v. Keys*,<sup>2</sup> in which the declaration was in case, and a verdict was given for the plaintiff on the third count, which alleged that the plaintiff, being desirous of selling his interest in the business, stock-in-trade, &c., in which he was engaged with defendant, was deceived by the fraudulent representation of the defendant, pending the treaty for the sale, that the defendant was about to enter into partnership to carry on the business with other persons whose names defendant refused to disclose, and that these persons would not consent to give plaintiff a larger price than 4500*l.* for his share, while the truth was that these persons were willing that the defendant should give as much as 5291*l.* 8*s.* 6*d.* The judgment in favour of plaintiff was arrested, Lord Ellenborough giving the opinion of the Court after advisement. His Lordship said that the cause of action as alleged amounted to nothing more than a *false reason* given by the defendant for his limited offer, and that this could not maintain the verdict, unless it was shown "that in respect of some consideration or other, existing between the parties to the treaty, or upon some general rule

At common law, *Vernon v. Keys* the only case in banco.

<sup>1</sup> Jacob, 178.

<sup>2</sup> 12 East, 632, and in Cam. Scacc. 4 Taunt. 498.

or principle of law, the party treating for a *purchase* is bound to allege truly, if he state at all, the motives which operate with him for treating, or for making the offer he in fact makes. A *seller* is unquestionably liable to an action of deceit if he fraudulently misrepresent the quality of the thing sold to be other than it is, in some particulars which *the buyer has not equal means with himself of knowing*, or if he do so in such manner as to *induce the buyer to forbear making the inquiries* which, for his own security and advantage, he would otherwise have made. But is a *buyer* liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers? I am not aware of any case or recognised principle of law upon which such a duty can be considered as incumbent upon a party bargaining for a purchase. It appears to be a false representation in a matter merely *gratis dictum*, by the bidder, in respect to which the bidder was under *no legal pledge or obligation to the seller* for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely, and for the consequences of which reliance therefore he can maintain no action."

When the case came before the Exchequer Chamber,<sup>1</sup> Puller, in argument, insisted that the false representation made by defendant was on a matter of *fact*, not of *opinion*, and that there was no case in which it had been held that an action would not lie under such circumstances; but the Court would hear no reply, and at once confirmed the judgment, Sir James Mansfield, C. J., simply saying: "The question is, whether the defendant is bound to disclose the highest price he chooses to give, or whether he be not at liberty to do that as a purchaser which every seller in this town does every day, who tells every falsehood he can to induce a buyer to purchase."

Jones v.

In Jones v. Franklin,<sup>2</sup> *coram* Rolfe, B., at Nisi Prius, the

<sup>1</sup> 4 Taunt. 488.

<sup>2</sup> 2 Mood. & R. 348.

action was *trover*, and the circumstances were that the plaintiffs, assignees of a bankrupt, were owners of a policy for 999*l.*, on the life of one George Laing, and early in 1840 had endeavoured, through their attorney, to sell it for 40*l.*, but could find no purchaser. Defendant knew this fact. On the 15th August Laing became suddenly very ill, and he died on the 20th. On the 18th, defendant employed one Cook to buy the policy for the defendant, and to give as much as sixty guineas for it. The vendor asked Cook when he applied to buy it what he thought it would be worth, and Cook said about sixty guineas. Cook and the defendant both knew that Laing was in imminent danger, but did not inform the vendor, who was ignorant of it, and sold the policy at that price, supposing Laing to be in good health. Rolfe, B., said "there could be no doubt such conduct was grossly dishonourable. But he had no difficulty in going further than this, and telling the jury that if they believed the facts as stated on the part of the plaintiffs, the defendant's conduct amounted to legal fraud, and he could not set up any title to the policy so acquired."

Franklin, at  
Nisi Prius.

It does not seem possible to reconcile this case with *Vernon v. Keys*. In both cases the purchasers made a false representation. But in *Vernon v. Keys*, the falsehood was *volunteered*, and misrepresented a *fact*; whereas in *Jones v. Franklin*, the buyer's statement, through his agent, that the policy was worth about sixty guineas, was only made in answer to a question of the vendor as to his *opinion*, and according to Lord Ellenborough, the buyer was "under no legal duty or obligation to the seller for the precise accuracy of his statement," and the seller could maintain no action for "the consequences of his own indiscretion in relying on it." There was, perhaps, enough in the case to bring it within the *equity* principle laid down by Lord Eldon in *Turner v. Harvey*,<sup>1</sup> but dishonourable and unfair as was the conduct of the buyer, it would be difficult to show, on authority, that it was in law such a fraud as vitiated the sale.

Case not reconcilable with  
*Vernon v. Keys*.

<sup>1</sup> 1 Jac. 169.

Decisions in America, that neither property nor possession pass to buyer who has defrauded vendor.

In America it has been held, that if a purchaser make false and fraudulent representations as to his own solvency, and means of payment, and thereby induces the vendor to sell to him on credit, no right either of property or possession is acquired by the purchaser, and the vendor would be justifiable in retaking the property, provided he could do so without violence.<sup>1</sup>

#### SECTION III.—FRAUD ON THE BUYER.

Buyer defrauded by vendor may avoid the sale.

Before or after delivery.

But must elect as soon as fraud is discovered.

Campbell v. Fleming.

In every case where a buyer has been imposed on by the fraud of the vendor, he has a right to repudiate the contract, a right correlative with that of the vendor to disaffirm the sale when he has been defrauded. The buyer under such circumstances may refuse to accept the goods, if he discover the fraud before delivery, or return them, if the discovery be not made till after delivery; and if he has paid the price, he may recover it back on offering to return the goods, in the same state in which he received them.<sup>2</sup> But the contract is only *voidable*, not *void*, and the buyer must elect as soon as he discovers the fraud, whether he will complete or repudiate the contract. He may not lie by, and treat the property as his own, and afterwards reject it. His acquiescence in the sale, although tacit, after discovery of the fraud, will be considered as an election to confirm it, and this result will not be affected by the fact of his subsequently discovering a new incident in the fraud, for this would not confer a new right to rescind, but would merely confirm the previous knowledge of the fraud.

These principles are well illustrated in the case of *Campbell v. Fleming*.<sup>3</sup> The plaintiff, deceived by false representations of the defendant, purchased shares in a mining company. After the purchase, he discovered the fraud, and that the whole scheme of the company was a deception. The

<sup>1</sup> *Hodgedon v. Hubbard*, 18 Vermont R. 504; *Johnson v. Peck*, 1 Wood. & Min. (Mass.), 334; *Mason v. Crosby*, 1 Wood. & Min. 342.

<sup>2</sup> *Clarke v. Dickson*, E. B. & E. 148,

and 27 L. J., Q. B. 223; *Murray v. Mann*, 2 Ex. 538; *Street v. Blay*, 2 B. & Ad. 456.

<sup>3</sup> 1 Ad. & E. 40.

action was brought to recover the purchase-money that he had paid. But it appeared that subsequently to the discovery of the fraud, the plaintiff had treated the shares as his own, by consolidating them with other property in the formation of a new company, in which he sold shares, and realised a considerable sum. The plaintiff then endeavoured to get rid of the effect of the confirmation of the contract, resulting from his dealing with the shares as his own, by showing that at a still later period he had discovered another fact, namely, that only 5000*l.* had been paid for the purchase of property by the mining company, although it was falsely represented to the plaintiff when he took the shares that the outlay had been 35,000*l.* The plaintiff was nonsuited by Lord Denman, and on the motion for new trial all the judges held the nonsuit right. Littledale, J., said: "After the plaintiff learned that an imposition had been practised on him, he ought to have made his stand. Instead of doing so, he goes on dealing with the shares, and in fact disposes of some of them. Supposing him not to have had at that time so full a knowledge of the fraud as he afterwards obtained, *he had given up his right of objection by dealing with the property after he had once discovered that he had been imposed upon.*" Parke, B., said: "After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; *and the fraud could do no more than entitle him to rescind.*" Patteson, J., concurred, and said: "Long afterwards he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; *and it cannot revive the right of repudiation which has been once waived.*" Lord Denman, C. J., said: "There is no authority for saying that a party must know *all the incidents of a fraud before he deprives himself of the right of rescinding.*"

The rules of law defining the elements which are essential to constitute such fraud as will enable a purchaser to avoid a sale were long in doubt, and there was specially a marked conflict of opinion between the Court of Queen's Bench and

What elements are necessary to entitle buyer to rescind sale on ground of fraud.



False representation not sufficient if innocently made.

the Exchequer, until the decisions of the Exchequer Chamber, in *Evans v. Collins*,<sup>1</sup> in 1844, and *Ormrod v. Huth*,<sup>2</sup> in 1845, established the true principle to be that a *representation, false in fact*, gives no right of action, if *innocently made* by a party who believes the truth of what he asserts; and that in order to constitute fraud, there must be a false representation *knowingly made, i.e. a concurrence of fraudulent intent and false representation*. And a false representation is *knowingly made*, when a party for a fraudulent purpose states what he does not *believe* to be true, even though he may have no *knowledge* on the subject. These decisions bring back the law almost exactly to the point at which it was left by the King's Bench in the great leading cases of *Pasley v. Freeman*,<sup>3</sup> and *Haycraft v. Creasy*,<sup>4</sup> decided in 1789 and 1801.

*Pasley v. Freeman.*

In the former of these cases it was held, that a false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit; and that such action will lie, though the defendant may not benefit by the deceit, nor collude with the person who is to benefit by it. *Pasley v. Freeman* was an action brought against a party for damages, for falsely representing a third person to be one whom the plaintiff could safely trust, the *defendant well knowing* that this was not true.

*Haycraft v. Creasy.*

In the latter case, *Haycraft v. Creasy*, it was held, that an action of deceit would *not* lie upon similar false representations, though the party affirmed that he spoke of his own knowledge, if *the representations were made bona fide with a belief in their truth*.

*Foster v. Charles.*

After a series of intervening cases, that of *Foster v. Charles*<sup>5</sup> came twice before the Common Pleas in 1830 and 1831, and was deliberately approved and followed by the Queen's Bench in *Polhill v. Walter*,<sup>6</sup> in 1832. It was held in these cases unnecessary to prove "a corrupt motive of

*Polhill v. Walter.*

<sup>1</sup> 5 Q. B. 820.

<sup>2</sup> 14 M. & W. 650.

<sup>3</sup> 3 T. R. 51; 2 Sm. L. C. 71, 6th ed.

<sup>4</sup> 2 East, 92.

<sup>5</sup> 6 Bing. 396, and 7 Bing. 105.

<sup>6</sup> 3 B. & Ad. 122.

gain to the defendant, or a wicked motive of injury to the plaintiff. It is enough if a representation is made which the party making it *knows to be untrue*, and which is intended by him, or which, from the mode in which it is made, is *calculated to induce another to act on the faith of it* in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature is, in the legal sense of the word, a *fraud*."

While the authorities stood in this condition, the cases of *Cornfoot v. Fowke*<sup>1</sup> and *Fuller v. Wilson*<sup>2</sup> were decided, the former in the Exchequer, in 1840, and the latter in the Queen's Bench, in 1842, the judges in the latter case expressly declining to follow the ruling in the former, and adopting in preference the dissenting opinion of Lord Abinger.

*Cornfoot v. Fowke*<sup>1</sup> was a case in which the defendant refused to comply with an agreement to take a furnished house, on the ground that he had been defrauded by the plaintiff and others in collusion with him. The house had been represented to the defendant by plaintiff's agent as being entirely unobjectionable, whereas the adjoining house was a brothel and a nuisance, which was compelling people in the neighbourhood to leave their houses. This fact was *known to the plaintiff*, but was *not known to his agent*, who made the representation, and the *plaintiff did not know* that the representation had been made. All the cases, from the leading one of *Pasley v. Freeman*,<sup>3</sup> were cited in argument, and the majority of the Court, Rolfe, Alderson, and Parke, BB., held the defence unavailing, while Lord Abinger, C.B., said that the opposite conclusion was so plain as not to admit a doubt in his mind, but for the dissent of his brethren.

Rolfe, B., held the question to be one as to the power of an agent "to affect his principal by a representation *collateral to the contract*. To do this, it is essential \* \* \* to bring home fraud to the principal, and \* \* \* all the facts are consistent with the hypothesis that the plaintiff

<sup>1</sup> 6 M. & W. 358.

<sup>2</sup> 3 Q. B. 58.

<sup>3</sup> 3 T. R. 51.

innocently gave no directions whatever on the subject, supposing that the intended tenant would make the necessary inquiries for himself."

Alderson, B., said: "Here the representation, though false, was believed by the agent to be true. He therefore, if the case stopped here, has been guilty of no fraud. \* \* \* It is said that the knowledge on the part of the principal is sufficient to establish the fraud. If indeed, the principal had instructed his agent to make the false statement, this would be so, although the agent would be innocent of any deceit; but this fact also fails. \* \* \* I think it impossible to sustain a charge of fraud when neither principal nor agent has committed any,—the principal, because, though he knew the fact, he was not cognisant of the misrepresentation being made, nor even directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bonâ fide*.

Parke, B., pointed out that the representation was no part of the contract, which was in writing, and therefore it could not affect the rights of the parties except on the ground that it was fraudulent. On the simple facts, each person was innocent, because the plaintiff made no false representation himself, and although his agent did, the agent did it innocently, not knowing it to be false; and the proposition seemed untenable that if each was innocent, the act of either or both could be a fraud. It was conceded that an innocent principal would be bound if his agent committed a fraud, but in the case presented, the agent acted without fraudulent intent. It was also conceded that "if the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked of him, and at the same time suspecting or believing that it would by reason of such ignorance be answered in the negative, the plaintiff would unquestionably be guilty of a fraud." His Lordship deemed it immaterial whether the making of such representations as were made by the agent was within the scope of his authority or not, as they

could not affect the contract unless *fraudulent*. Lord Abinger, C. B., gave an elaborate dissenting opinion, in which he held "that it is not correct to suppose that the legal definition of fraud and covin necessarily includes any degree of moral turpitude; \* \* \* the warranty of a fact which does not exist, or the representation of a material fact contrary to the truth are both said in the language of the law to be fraudulent, although the party making them suppose them to be correct;" that there was not a total absence of moral turpitude in the agent, even upon the presumption that he was wholly ignorant of the matter: that "nothing can be more plain than that the principal, though not bound by the representation of his agent, cannot take advantage of a contract made under the false representation of an agent, whether that agent was authorised by him or not to make such representation;" that it did not follow because the plaintiff was not bound by the representation of the agent, even if made without authority, that "he is therefore entitled to bind another man to a contract obtained by the false representation of that agent. *It is one thing to say that he may avoid a contract if his agent without his authority has inserted a warranty in the contract, and another to say that he may enforce a contract obtained by means of a false representation made by his agent, because the agent had no authority.*"

In *Fuller v. Wilson*,<sup>1</sup> which was an action on the case for a false representation, the Queen's Bench, through Lord Denman, C. J., declined to take any ground other than the broad proposition of Lord Abinger, which they adopted, "that whether there was moral fraud or not, if *the purchaser was actually deceived in his bargain, the law will relieve him from it*. We think the principal and his agent are for this purpose completely identified, and that the question is not what was passing in the mind of either, but *whether the purchaser was in fact deceived by them or either of them.*"

The conflict of opinion cannot be more plainly stated. The Queen's Bench thought the sole test was whether the

*Fuller v.  
Wilson.*

Conflict of  
opinion between  
the Queen's

<sup>1</sup> 3 Q. B. 58.

Bench and  
Exchequer.

*purchaser was deceived by an untrue statement into making the bargain.* The Court of Exchequer thought it further necessary that the party making the untrue statement *should know it to be untrue.*

Fuller v. Wilson was reversed in error,<sup>1</sup> solely on the ground that the facts of the case did not show any misrepresentation on the part of the vendor, but only the purchaser's own misapprehension; and Tindal, C. J., in delivering the opinion, stated that the Court did "not enter into the question discussed in *Cornfoot v. Fowke.*"

Moens v.  
Heyworth.

In *Moens v. Heyworth*,<sup>2</sup> in 1842, the question again came before the Exchequer of Pleas, (the case of *Fuller v. Wilson* not being yet reported,) and Lord Abinger renewed the expression of his dissent from Parke, B., and Alderson, B., repeating that "The fraud which vitiates a contract, \* \* \* does not in all cases necessarily imply moral turpitude." His Lordship instanced the sale of a public-house, and an untrue statement by the seller that the receipts of the house were larger than was the fact, but the untrue statement might be made without dishonest intent, as if proper books had not been kept. In such case his Lordship insisted that the purchaser might maintain an action on the false representation, even though the vendor did not know that it was false when made. The other judges held the contrary, Parke, B., saying distinctly, that in such cases "it is essential that there should be moral fraud."

Taylor v.  
Ashton.

In the next year, 1843, *Taylor v. Ashton*<sup>3</sup> came before the same Court, and the judgment of the Queen's Bench in *Fuller v. Wilson* was relied on by the plaintiff, but Parke, B., said when it was cited: "I adhere to the doctrine that an action for deceit will not lie without proof of moral fraud, and Lord Denman seems to admit that to be so. If the party *bonâ fide* believes the representation he made to be true, though he does not *know* it, it is not actionable." The learned Baron afterwards delivered the judgment of the Court, *holding* that "it was not necessary, in order to con-

<sup>1</sup> *Wilson v. Fuller*, 3 Q. B. 1009.

<sup>2</sup> 10 M. & W. 147.

<sup>3</sup> 11 M. & W. 401.

stitute fraud, to show that the defendants *knew* the fact to be untrue: it was enough that the fact was untrue, *if they communicated that fact for a deceitful purpose*; \* \* \* if they stated a fact which was untrue for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and moral fraud."

In 1848, the Queen's Bench had before them the case of *Evans v. Collins*,<sup>1</sup> which was an action by a sheriff to recover damages against an attorney for falsely representing a certain person to be the person against whom a *ca. sa.* had been sued out by the attorney, so that the sheriff had been induced to take the wrong person into custody, and had thereby incurred damage. The jury found that the defendant had probable reason for believing that the person pointed out to the sheriff was really the person against whom the *ca. sa.* was issued, so that there was clearly a total absence of moral turpitude. It had, however, been previously held, in *Humphrys v. Pratt*,<sup>2</sup> in the House of Lords, that an execution creditor was bound to indemnify a sheriff who had seized goods pointed out by the creditor, and upon his requisition and false representation that they belonged to his debtor, although the counts in the declaration did not aver any knowledge or belief on the part of the execution creditor that his representation was false. On the authority chiefly of this decision in the House of Lords, Lord Denman, C. J., held the action in *Evans v. Collins* maintainable, but he added: "One of two persons has suffered by the conduct of the other. The sufferer is wholly free from blame: but the party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not know to be true; and it is just that he, not the party whom he has misled, should abide the consequence of his misconduct. The allegation *that the defendant knew his representation to be false is therefore immaterial*:"

<sup>1</sup> 5 Q. B. 804.

<sup>2</sup> 5 Bligh, N. S. 154.

without it, the declaration discloses enough to maintain the action."

Reversed in  
Exchequer  
Chamber.

This case was reversed in the Exchequer Chamber,<sup>1</sup> after time taken for consideration, by the unanimous judgment of Tindal, C. J., Coltman, Erskine, and Maule, JJ., and Parke, Alderson, Gurney, and Rolfe, BB. The Court stated the question to be distinctly "whether a statement or representation which is *false in fact, but not known to be so by the party making it*, but, on the contrary, made honestly and in the full belief that it is true, affords a ground of action." The Court held, that on the whole current of authority, "*fraud must concur with the false statement* in order to give a ground of action." The Court explained the decision in *Humphrys v. Pratt*,<sup>2</sup> in which no reasons were assigned for the judgment, as having proceeded on the ground that the execution creditor in that case had made the sheriff his agent, and was bound to indemnify him for the consequences of acts done under the principal's instructions.

Ormrod v.  
Huth.

The next case was *Ormrod v. Huth*,<sup>3</sup> in the Exchequer Chamber, in 1845, on error from the Exchequer of Pleas, so that the judges of the Queen's Bench must have taken part in the judgment. Tindal, C. J., laid down the rule, which he said was supported both by the early and later cases, so clearly as to render it unnecessary to review them, in the following words:—"Where upon the sale of goods the purchaser is satisfied without requiring a warranty, (which is a matter for his own consideration,) he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bot-tomed in fraud. If, indeed, the representation was *false to the knowledge of the party making it*, this would in general be *conclusive evidence* of fraud; but if the representation was honestly made and believed at the time to be true by the party making it, though not true in point of fact, *we think this does not amount to fraud in law*."

Bailey v.  
Walford.

Finally the Queen's Bench abandoned their former doctrine in express terms in 1846, Lord Denman, C. J., de-

<sup>1</sup> 5 Q. B. 820.

<sup>2</sup> 5 Bligh, N. S. 154.

<sup>3</sup> 14 M. & W. 650.

livering the opinion in *Bailey v. Walford*<sup>1</sup> in these words: "The judgment which was given in this Court in *Evans v. Collins* (5 Q. B. 804) affirming the proposition that every false statement made by one person and believed by another, and so acted upon as to bring loss upon him, constituted a grievance for which the law gives a remedy by action, has been overruled by the Court of Exchequer Chamber, (5 Q. B. 829,) \* \* \* and we must admit the reasonableness of the doctrine there at length laid down."

The law thus settled has since remained unshaken, and in 1860 the Queen's Bench held that it was established by *Collins v. Evans*, and numerous other authorities, that "to support an action for false representation, the representation must *not only have been false in fact, but must also have been made fraudulently.*"<sup>2</sup>

In *Western Bank of Scotland v. Addie*,<sup>3</sup> the charge to the jury was, that "if the directors took upon themselves to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves, and which *they did not believe, or had no reasonable ground to believe* to be true, that would be a misrepresentation and deceit." In the House of Lords, the Lord Chancellor approved this direction, saying: "Suppose a person makes an untrue statement which he asserts to be the result of a *bond fide* belief of its truth, how can the *bond fide* be tested, except by considering the grounds of such belief? And if an untrue statement is made, founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterised as misrepresentation and deceit." But Lord Cranworth thought this was going rather too far, and said: "I confess that my opinion was that in what his Lordship thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs,

*Western Bank  
of Scotland v.  
Addie.*

<sup>1</sup> 9 Q. B. 197.

judgment of Lord Campbell, in

<sup>2</sup> *Childers v. Wooler*, 2 E. & E. 287, and 29 L. J., Q. B. 129. See, also,

*Wilde v. Gibson*, 1 H. of L. 638.

<sup>3</sup> L. R. 1, Scotch App. 145.



which they *bond fide* believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care or caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, and so that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

Second point in *Cornfoot v. Fowke* has been questioned, as to liability of principal for false representations by agent.

It is necessary to guard the reader against concluding, that the case of *Cornfoot v. Fowke*,<sup>1</sup> has remained unquestioned upon the point that the principal will not be liable for the consequences of false representations made by his agent, with full belief in their truth, when the principal himself has a knowledge of the real facts. In the *National Exchange Company of Glasgow v. Drew*,<sup>2</sup> it was commented on by Lords Cranworth and St. Leonards, the latter learned Lord saying, distinctly: "I should feel no hesitation, if I had myself to decide that case, in saying, that although the representation was not fraudulent,—the agent not knowing that it was false,—yet that as it in fact was false, and false to the knowledge of the principal, it ought to *vitate the contract*." Lord Campbell, also, in *Wheelton v. Hardisty*,<sup>3</sup> said: "As to *Cornfoot v. Fowke*, which was brought before us to illustrate the liability of a principal for his agent, I am not called upon to say whether that case was well decided by the majority of the judges in the Exchequer, although the voice of Westminster Hall was, I believe, rather in favour of the dissentient Chief Baron."<sup>4</sup>

Udell v. Atherton.

The subject was much discussed in *Udell v. Atherton*,<sup>5</sup> which, it is submitted, has been misunderstood to some ex-

<sup>1</sup> 6 M. & W. 358.

<sup>2</sup> 2 MacQueen, H. of L. C. 103.

<sup>3</sup> 8 E. & B. 270; 26 L. J., Q. B. 265—275.

<sup>4</sup> See, also, *Barwick v. English Joint Stock Company*, L. R. 2, Ex. 259; 36 L. J., Ex. 147.

<sup>5</sup> 7 H. & N. 172; 30 L. J., Ex. 337.

tent.<sup>1</sup> The facts were these: The defendant's traveller sold a log of mahogany to the plaintiff, and warranted it sound, without authority, and *knowing that it was defective*. The buyer gave two bills of exchange for the price, at four and six months. The first bill was paid; before the maturity of the second bill, the plaintiff, who had been in possession of the log from the time of the sale, ordered it to be cut up, and then discovered that there was a defect, which reduced its value one half. This defect was patent on inspection, for it had been pointed out to the traveller on a previous occasion, when he attempted to sell the log to another person. The defendant was wholly innocent, knowing nothing either of the defect, or of the fraudulent representation of the traveller. The purchaser, on the defendant's refusal to make an allowance, brought an action *for deceit*. The Court was equally divided, Pollock, C. B., and Wilde, B., holding the action to be maintainable, and Bramwell and Martin, BB., holding the contrary. But the two last-named judges dissented solely on the ground that the defendant was not liable *in that form of action*; and Martin, B., very distinctly admitted that the buyer would have had the right to *rescind the contract*, on the ground of fraud committed by the agent, if the plaintiff had not deprived himself of this remedy, by cutting up and using the log, so that he could not restore it. All the judges were of opinion that the fraud of the agent would affect the validity of the contract, but Martin, B., pointed out, as the true distinction, that "in an action *upon the contract*, the representation of the agent is the representation of the principal, but in an action *on the case for deceit*, the misrepresentation or concealment must be proved against the principal."<sup>2</sup>

The distinction between an action on the *contract* and an action in *tort* for the deceit in such cases of fraud by agents, seems to have been finally established as settled law by the

Western  
Bank of Scot-  
land v. Addie.  
Distinction  
between action

<sup>1</sup> See note at p. 761 of Broom's law on this subject in *Barwick v. Leg. Max.*, 4th ed., and 2 Sm. L. C., English Joint Stock Bank, L. B. p. 96, 6th ed. Ex. 259; 36 L. J., Ex. 147.

<sup>2</sup> See an instructive review of the

in *tort* for deceit  
against prin-  
cipal and action  
on the contract.

very recent case of the *Western Bank of Scotland v. Addie*,<sup>1</sup> decided in the House of Lords, in May, 1867. The plaintiff's action was based on the allegation that he had been induced to buy *from the company* a number of its shares, by the fraudulent representations of its *agents, the directors*. The demand, according to the forms of the Scotch law, was in the alternative for a *restitutio in integrum*, or for damages. The principles governing the case were laid down by the Lord Chancellor (Lord Chelmsford), and by Lord Cranworth, in entire conformity with the opinion of Martin, B., in *Udell v. Atherton*. Lord Chelmsford said: "The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this:—where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract prefers to *bring an action for damages for the deceit, such an action cannot be maintained against the company, but only against the directors personally.*" \* \* \*

"It may seem a hardship on the pursuer that he should be compelled to keep the shares, because, in ignorance of the fraud practised on him, he retained them until an event occurred which changed their nature, and prevented his returning the very thing which he received. But he is not without remedy. If he is fixed with the shares, he may still have his action for damages against the directors, supposing he is able to establish that he was induced to enter into the

<sup>1</sup> L. R. 1, Scotch App. 145.

contract by misrepresentations for which they are responsible."

Lord Cranworth first concurred in deciding that the plaintiff had lost his right to rescind the contract, because he was unable to put the adverse party in the same situation in which they stood when the contract was entered into. On the other point, his Lordship said: "The appellants are not the persons who were guilty of the fraud. \* \* \* An incorporated company cannot in its corporate character be called on to answer in an action for deceit. But if by the fraud of its agents, third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds. If it is supposed from what I said when the case of *Ranger v. Great Western Railway Company*<sup>1</sup> was decided in this house, I meant to give as my opinion that the company could in that case have been made to *answer as for a tort in an action for deceit*, I can only say I had no such meaning. \* \* \* In what I said, I merely wished to guard against its being supposed that I assented to the argument, that there would be no means of reaching the company, if the fact of the fraud had been established. By what particular proceeding relief could have been obtained is a matter on which I did not intend to express, and indeed had not formed, any opinion.

"An attentive consideration of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the country is now carried on, may be made responsible for the frauds of those agents to the extent to which the companies have profited from these frauds; *but that they cannot be sued as wrongdoers, by imparting to them the misconduct of those whom they have employed*. A person defrauded by *directors*, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action for the fraud, must seek his remedy against the directors personally." The plaintiff was therefore held not entitled to recover on either ground.

<sup>1</sup> 5 H. of L. Cas. 72.

Principles established in cases where a buyer has been defrauded by agent of vendor.

This case must be considered as settling conclusively, that where a purchaser has been induced to buy through the fraud of an agent of the vendor, the latter being innocent, the purchaser may—

Rights of buyer.

1st. Rescind the contract, if he can return the thing bought in the condition in which he received it, but not otherwise: or he may

2ndly. Maintain an action for deceit against the agent personally; but

3rdly. Cannot maintain that, or any action in *tort*, against the innocent principal.

Further remedy in equity.

Further, *it seems*, he may have a claim against the principal for a return of the price to the extent to which the latter has profited by the fraud of his agent, but his remedy, if any, would be in equity; for it was admitted on all sides, in *Udell v. Atherton*, that if the action for deceit would not lie, the purchaser was remediless at law, when not in a condition to sue for a rescission.

A buyer may have a remedy for false representation by innocent vendor, when representation amounts to warranty.

It must not be concluded from this review of the authorities that the purchaser, who has been induced by false representations to make the contract, is always without remedy because the vendor believed the statements to be true, and was innocent of any fraudulent intent. These cases only establish that the vendor has committed no *wrong*, and is therefore not liable in an action of *deceit*, or any other action founded on *tort*. But, in very many instances, a representation made by the vendor amounts in law to a *warranty*, and when this is the case, the purchaser has remedies on the *contract*, for breach of the warranty. The rules of law by which to determine when a representation is a warranty, and what are the rights of the buyer for a breach of this warranty, when the representation is false, are treated, *post*, Book IV., Part 2, Ch. 1, on *Warranty*.

Feret v. Hill.  
Converse of  
Cornfoot v.  
Fowkes.

The case of *Feret v. Hill*<sup>1</sup> has been omitted in the foregoing review, in order not to interrupt the exposition of the point directly under discussion, but the case well deserves

<sup>1</sup> 15 C. B. 207; 23 L. J., C. P. 183.

consideration. It was in its facts the converse of *Cornfoot v. Fowke*. The defendant Hill was the owner of a tenement, and the plaintiff sent an agent to him to give assurances of the plaintiff's good character and reputation, in order to induce the defendant to let the premises to the plaintiff. The agent was innocent, and was honest in his assurances of the plaintiff's good character, but in point of fact the plaintiff, who pretended that he wanted the premises for carrying on business as a perfumer, intended to convert them into a brothel. The plaintiff was let into possession and used the premises as a brothel, and the defendant discovering the fraud practised on him, ejected the plaintiff forcibly from the apartments, after having given him a notice to quit, which he disregarded. The plaintiff then brought ejectment to recover possession of the apartments, and the jury found, first, that the plaintiff, at the time he entered into the agreement, intended to use the premises for a brothel; and secondly, that he had induced the defendant to enter into the agreement *by fraudulent misrepresentation as to his character, and as to the purpose for which he wanted the premises*. The verdict was for the defendant, and Crowder, J., reserved leave to the plaintiff to move to enter the verdict in his favour, if the Court should be of opinion that the agreement, notwithstanding this finding, was valid. The motion prevailed, and the plaintiff was held entitled to enforce the agreement, on the ground that the misrepresentation was of a fact *collateral to the agreement*, Jervis, C. J., saying that there was no misrepresentation "as to the legal effect of the instrument which he (the defendant) executed, nor as to what he was doing, or that he was doing one thing, when in fact he was doing another." The other judges also put the case upon the ground that the Court was not called on to enforce any agreement at all, but to replace premises in the possession of a man who had an executed legal title to the possession: that it was impossible to say that nothing passed under the demise, simply because it was obtained by fraudulent misrepresentation.

Defrauded  
lessor.

The effect of this decision seems to be, that a defrauded lessor, who has actually executed a demise, cannot treat it as a nullity, but must proceed to have it rescinded on the ground of the fraud by an appropriate tribunal, before treating it as non-existent; such appropriate tribunal not being a court of law, but one of equity.

Shareholders  
defrauded by  
prospectus.

In further illustration of the effect of fraudulent representations to the prejudice of the purchaser, the reader is referred to the series of decisions rendered in cases where shareholders in companies have attempted to relieve themselves from responsibility by showing that they had been induced to take the shares through fraudulent representations of the directors. These cases are all reviewed in *Oakes v. Turquand*,<sup>1</sup> decided in the House of Lords in August, 1867, in which it was settled that such contracts are voidable only, not void, and that the defrauded shareholders cannot relieve themselves from responsibility to creditors, by disaffirming the contract after the company has failed and has been ordered to be liquidated in Chancery.

Devices which  
have been held  
fraudulent  
against buyer.

It would be an onerous and scarcely useful task to enumerate the various devices which, in adjudicated cases, have been held by the courts to be frauds on purchasers. The principles stated in this chapter have been illustrated in numerous decisions.<sup>2</sup> Some of those which have most frequently occurred in practice will be presented as examples.

Puffers at  
auction.  
*Bexwell v.*  
*Christie*.

In *Bexwell v. Christie*<sup>3</sup> it was held to be fraudulent in the vendor to bid by himself or agents at an auction sale of his own goods, where the published conditions were "that the highest bidder shall be the purchaser, and if a dispute arise, to be decided by a majority of the persons present." Lord Mansfield also in that case held it to be a fraud on the

<sup>1</sup> L. R. 2, Eng. & Ir. App. 325.

<sup>2</sup> *Early v. Garret*, 9 B. & C. 928;  
*Duke of Norfolk v. Worthy*, 1 Camp.  
340; *Hill v. Gray*, 1 Stark. 434;  
*Jones v. Bowden*, 4 Taunt. 847;  
*Barber v. Morris*, 1 Mood. & R. 62;

*Tapp v. Lee*, 3 B. & P. 367; *Corbett*  
*v. Brown*, 8 Bing. 83; *Hill v.*  
*Perrott*, 3 Taunt. 274; *Abbotts v.*  
*Barry*, 2 B. & B. 369.

<sup>3</sup> 1 Cowp. 395.

public, and therefore on the buyer, for the vendor falsely to describe his goods offered at auction as "the goods of a gentleman deceased, and sold by order of his executor."

The foregoing case was highly eulogised, and followed by Lord Kenyon and the King's Bench in *Howard v. Castle*; <sup>1</sup> and the employment of "puffers" as they are termed, that is, persons engaged to bid in behalf of the vendor in order to force up the price against the public, has ever since been held fraudulent.<sup>1</sup>

In the case of *Warlow v. Harrison*, decided in Queen's Bench,<sup>2</sup> and afterwards in the Exchequer Chamber,<sup>3</sup> the law on the subject of the auctioneer's responsibility in such cases was examined on the following state of facts:—The defendant was an auctioneer, having a horse repository, and they advertised for sale a mare, "the property of a gentleman, *without reserve*." The plaintiff attended the sale, and bid 60 guineas, and another person bid 61 guineas. The plaintiff, being informed that this last person was the owner, declined to bid further, and the horse was knocked down to the owner as purchaser at 61 guineas. The plaintiff at once informed the defendant and the owner that he claimed the mare as the highest *bonâ fide* bidder, the sale having been advertised "without reserve." The owner refused to let him have the mare, and he thereupon tendered to the defendant, the auctioneer, 60 guineas in gold, and demanded the mare. The plaintiff had notice of the conditions of the sale, among which were the following:—"First. The highest bidder to be the buyer, and if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer may declare the purchaser. Third. The purchaser being declared, must immediately give in his name and address, with, if required, a deposit of 5s. in the pound

*Howard v. Castle.*

*Warlow v. Harrison.*

Auctioneer responsible for fraud on buyer.

<sup>1</sup> 6 T. R. 642. See, also, *Wheeler v. Collier*, 1 M. & W. 123; *Crowder v. Austin*, 3 Bing. 368; *Rex v. Marsh*, 3 Y. & J. 381; *Thornett v. Haines*, 15 M. & W. 367; *Green v. Baverstock*, 14 C. B., N. S. 204, and 32 L. J., C. P. 180.

<sup>2</sup> 28 L. J., Q. B. 18.

<sup>3</sup> 1 E. & E. 295; 29 L. J., Q. B. 14.



on account of his purchase, and pay the remainder before such lot is delivered. *Eighth.* Any lot ordered for this sale and sold by private contract by the owner, or advertised 'without reserve,' and bought by the owner, to be liable to the usual commission of 2*l.* per cent." As the judgment of the Exchequer Chamber turned much upon the pleadings, it is necessary to state that the plaintiff's declaration, after alleging the advertisement for sale without reserve, went on to aver that he attended the sale and *became the highest bidder*, "and thereupon and thereby *the defendant became and was the agent of the plaintiff to complete the contract*;" and then charged a breach of the defendant's duty to the plaintiff *as the plaintiff's agent* in failing to complete the contract in behalf of the plaintiff. The defendant pleaded: First, not guilty. Secondly, that the plaintiff was not the highest bidder. Thirdly, that the defendant did not become the plaintiff's agent as alleged.

In the plaintiff's argument the following civil law authorities were cited: Cicero de Officiis, lib. 3, s. 15, "Tollendum est igitur ex rebus contrahendis omne mendacium, non licitorem venditor, nec qui contra se liceatur, emptor apponet;" and Huberus, lib. 18, tit. 2, s. 7, Prælectiones: "Sed hoc facile constabit, si venditor falsum emptorem inde ab initio subornet, qui plus aliis offerat, ut veris emptoribus præmium maximæ licitationis, vulgo, stryckgelt, quo nihil usitatius, intercipiat, dolo detecto, venditorem teneri ad præmium vero licitatori maximo præstandum, quia hoc est contra fidem conventionis perfectæ quâ statutum est ut maximo licitatori præmium daretur." Lord Campbell, C. J., delivered the unanimous judgment of the Queen's Bench, holding:

*First.*—That it was not true in point of law that the auctioneer is the agent of the purchaser until the acceptance of his bid as being the highest, which acceptance is shown by knocking down the hammer; and that till then the auctioneer is exclusively the agent of the vendor.

*Secondly.*—That both parties may retract till the hammer is knocked down; that no contract takes place between them

till that is done; and that the auctioneer cannot be bound when both the vendor and bidder remain free.

The learned Chief Justice then said in the name of the Court :

*Thirdly.*—"We are clear that the bidder has no remedy against the auctioneer, whose authority to accept the offer of the bidder has been determined by the vendor before the hammer has been knocked down."

Although this judgment of the Queen's Bench was not reversed in the Exchequer Chamber, because approved on the pleadings as they stood, the third proposition above quoted was not affirmed, and the Court of Errors gave leave to the plaintiff to amend, so as to enforce a liability against the auctioneer. The Exchequer Chamber, composed of Martin, Bramwell, and Watson, BB., and Willes and Byles, JJ., were unanimous in holding the auctioneer liable, and in giving leave to amend; but Willes, J., and Bramwell, B., without dissenting from the opinion of the majority, as delivered by Martin, B., preferred putting their judgment on a different ground, on which they felt themselves more clearly justified in their conclusions. Martin, B., first declared that the judgment of the Queen's Bench was right upon the pleadings, but that the Court of Appeal being now vested with power to amend, and the object of the law being to determine the real question in controversy, the power ought to be "largely exercised" for that purpose; and that upon the facts, the plaintiff was entitled to recover.

The learned Baron then proceeded as follows: "In a sale by auction there are three parties, namely, the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed: he was a concealed principal. The names of the auctioneers, of whom the defendant was one, alone were published, and the sale was announced by them to be '*without reserve*.' This, according to all the cases both at law and in equity, means

that neither the vendor nor any person on his behalf may bid at the auction, and that the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not. For this position, see the case of *Thornett v. Haines*, 15 M. & W. 367. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward; or that of a railway company publishing a timetable, stating the times when and the places at which the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him. *Denton v. The Great Northern Railway Company*, 5 E. & B. 860, 25 L. J., Q. B. 129. Upon the same principle it seems to us, that *the highest bonâ fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve*. We think that the auctioneer who puts property up for sale upon such a condition, pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so, and that *this contract is made with the highest bonâ fide bidder, and in case of a breach of it, he has a right of action against the auctioneer*. \* \* \* We entertain no doubt that the owner may at any time before the contract is legally complete, interfere and revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."

Auctioneer in sale "without reserve" contracts with the highest *bonâ fide* bidder, that he shall become purchaser.

In reference to the conditions of the sale, the learned Baron further said, as to the first condition, that the owner could not be the buyer, and the auctioneer ought to have refused his bid, giving for a reason, that the sale was without reserve; and that the Court were inclined to differ with the Queen's Bench, and to consider that the owner's bid was not a revocation of the auctioneer's authority. The *eighth* condition was construed as providing simply that if the owner acted contrary to the conditions of the sale, he must pay the usual commissions. The Court was therefore

ready to give judgment for the plaintiff if he chose to amend his declaration.

Willes, J., and Bramwell, B., preferred putting their assent to the judgment on the ground that the facts furnished strong evidence to show that the auctioneer had received no authority from the owner to advertise a sale "without reserve;" and that the plaintiff ought to be allowed to amend by adding a count, alleging an undertaking by the auctioneer that he had such authority, and a breach of that undertaking.

It was said at one time that the rule in equity differs from that at common law on the subject of puffers to this extent; that in equity it is allowable to employ one puffer, but no more, for the purpose only of preventing the property from being sold below a limit fixed by the vendor. Willes, J., in *Green v. Baverstock*,<sup>1</sup> however, expressed the opinion that the rule in equity was confined to sales under the order of the Court, in conformity with "an inveterate practice." But the existence of any such rule in equity appears to have been still a moot point, even in 1865, as is shown in the opinion of Lord Cranworth in *Mortimer v. Bell*.<sup>2</sup> By the new Act, however, 30 & 31 Vict. c. 48, passed at the instance of Lord St. Leonards (but applicable only to sale of land), it is provided in the fourth section, that "whereas there is at present a conflict between her Majesty's courts of law and equity in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the courts of law holding that all such sales are absolutely illegal, and the courts of equity under some circumstances giving effect to them, but even in courts of equity the rule is unsettled: and whereas it is expedient that an end should be put to such conflicting and unsettled opinions: Be it therefore enacted, that from and after the passing of this Act, whenever a sale by auction of land would be invalid at law by

Distinction between law and equity as to puffing at auction.

Act 30 & 31  
Vict. c. 48.

<sup>1</sup> 14 C. B., N. S. 204; 32 L. J.,      <sup>2</sup> L. R. 2, Ch. Ap. 10.  
C. P. 180.

reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law."

The statute further directs that where land is stated to be sold without reserve, it shall not be lawful for the seller to bid, or the auctioneer to accept, a bid from him or any one employed by him; and where the sale is subject to the right of a seller to bid, it shall be lawful for the seller or any one person in his behalf to bid.

The Act also forbids the courts of equity from continuing the practice of opening biddings in sales made under their orders; so that in future the highest *bond fide* bidder at such sales shall be the purchaser, in the absence of fraud or improper conduct in the management of the sale.

Dimmock v.  
Hallett.

In a recent case,<sup>1</sup> just before the passage of this Act, it was announced that the sale was "without reserve," and that the parties interested had liberty to bid. It was held by Lords Justices Turner and Cairns that on these terms, a purchaser was bound by his bid for 19,000*l.*, the only bids higher than 14,000*l.* having been made by the purchaser and a mortgagee in possession of the estate.

Telling false-  
hoods to buyer  
about owner-  
ship of horses,  
and their  
qualities, and  
the reasons for  
selling them.

In *The Queen v. Kenrick*,<sup>2</sup> the fraud on the purchaser, for which the defendant was convicted as being guilty of false pretences, was telling the buyer that the horses offered for sale had been the property of a lady deceased, were then the property of her sister, and never had been the property of a horse-dealer, and that they were quiet and tractable; all these statements being false, and the vendor knowing that nothing but a belief in their truth would induce the buyer to make the purchase.

False statement,  
exaggerating  
receipts of a  
public-house.

In *Dobell v. Stevens*,<sup>3</sup> the fraud consisted in falsely telling the buyer that the receipts of a public-house were 160*l.* per month, and the quantity of porter sold seven butts per month, and that the tap was let for 82*l.* per annum, and two rooms for 27*l.* per annum, whereby the plaintiff was induced to buy; and similar deceits were employed in *Lysney v. Selby*,<sup>4</sup> and *Fuller v. Wilson*.<sup>5</sup>

<sup>1</sup> *Dimmock v. Hallett*, L. R. 2, Ch. Ap. 21.

<sup>5</sup> Q. B. 49.

<sup>3</sup> 3 B. & C. 623.

<sup>4</sup> 2 Lord Raymond, 1118.

<sup>5</sup> 3 Q. B. 58.

In *Schneider v. Heath*,<sup>1</sup> a vessel was sold, "hull, masts, yards, standing and running rigging, *with all faults*, as they now lie." There was however, a false statement, that "the hull was nearly as good as when launched," and means were taken to conceal the defects that the vendor knew to exist. This was held by Sir James Mansfield to be a fraud on the purchaser; but in *Baglehole v. Walters*,<sup>2</sup> Lord Ellenborough was decided in his rejection of the purchaser's attempt to repudiate the sale of a vessel under exactly the same description, "with all faults," where the seller, although knowing the latent defects, used no means for concealing them from the purchaser. In this decision, Lord Ellenborough expressly overruled *Mellish v. Motteux*; <sup>3</sup> and in *Pickering v. Dowson*,<sup>4</sup> the Common Pleas followed Lord Ellenborough's decision, as one "never questioned at the bar;" and concurred in overruling *Mellish v. Motteux*.

Vessel sold with "all faults"—means used to conceal defects.  
*Schneider v. Heath.*

*Baglehole v. Walters.*

*Pickering v. Dowson.*

*Baglehole v. Walters* was also followed by the King's Bench in deciding *Bywater v. Richardson*,<sup>5</sup> in 1834.

In *Horsfall v. Thomas*,<sup>6</sup> the defence to an action on a bill of exchange was that the buyer had been defrauded in the purchase of a steel gun, for which the bill was given. The gun was made by defendant's order, and he was informed when it was ready, but made no examination of it, and sent the bill of exchange in part payment. There was a defect in the gun, and a metal plug was inserted, which would have concealed the defect from any person inspecting the gun. It was received by the defendant, fired several times, answered the purpose as long as it was entire, but afterwards burst in consequence of the defect. *Held*, that the defendant had not been influenced in his acceptance of the gun by the artifice used, for he had never examined it: that the mere statement by the plaintiffs to the defendant that the gun was ready for him, even if they knew the existence of a defect which would make the gun worthless,

Concealing defect, where buyer neglected to inspect.  
*Horsfall v. Thomas.*

<sup>1</sup> 3 Camp. 506.

<sup>2</sup> 3 Camp. 154.

<sup>3</sup> Peake, 115.

<sup>4</sup> 4 Taunt. 779.

<sup>5</sup> 1 Ad. & E. 508. See, also, *Freeman v. Baker*, 5 B. & Ad. 797.

<sup>6</sup> 1 H. & C. 90, and 31 L. J., Ex. 322.

and failed to inform him of it, was not a fraud. The learned judge, Bramwell, B., who delivered the judgment of the Court, said that "fraud must be committed by the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true and which it is the duty of the party to make known." In the case before the Court there was no affirmance; and there was no duty on the part of the maker to point out a defect where the buyer has an opportunity for inspection and does not choose to avail himself of it.<sup>1</sup>

*Hill v. Gray.* The case of *Hill v. Gray*,<sup>2</sup> decided by Lord Ellenborough  
*Sale of a picture.* at Nisi Prius in 1816, would seem to conflict with the general rule in relation to concealment; the facts were that the agent employed by plaintiff to sell a picture was pressed by the defendant to tell him whose property it was: the agent refused. The same agent was at the time selling also pictures for Sir Felix Agar, and the defendant, "misled by circumstances, erroneously supposed" that the picture in question also belonged to Sir Felix Agar, and under this misapprehension bought it. The agent "knew that the defendant laboured under this delusion, but did not remove it." The price was 1000*l.*, the picture being said to be a Claude, and proof was offered that it was genuine, and that after the defendant knew that it was not one of Sir Felix Agar's pictures he had objected to paying on the ground that it was not genuine, but not on the ground of any deception. Lord Ellenborough said: "Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and *not to have let in a suspicion on the part of the purchaser which he knew enhanced the price.* He saw that the defendant had fallen into a delusion in supposing the picture to be Sir Felix Agar's, and yet he did not remove it. \* \* \* This case has arrived at its termination, since it appears that the

<sup>1</sup> See *Keates v. Earl Cadogan*, 10 C. B. 591, and 20 L. J., C. P. 76; also, *Hill v. Gray*, 1 Stark. 434.  
<sup>2</sup> 1 Stark. 434.

purchaser laboured under a deception, in which the agent permitted him to remain, on a point *which he thought material to influence his judgment.*" This judgment, on a first perusal, seems certainly not reconcilable with the received principles on the subject, but in *Keates v. Earl Cadogan*<sup>1</sup> the case was explained by the Common Pleas by construing the language of Lord Ellenborough in the italicised passages as intimating that there "had been a positive aggressive deceit." It is, indeed, quite possible that it was the *act* of the agent in putting the picture with those of Sir Felix Agar that created the belief, which the agent perceived, and did not remove.

In the earlier case of *Jones v. Bowden*,<sup>2</sup> an action upon the case for deceit in a sale was maintained under the following circumstances:—The defendant bought pimento at an auction sale, as sea-damaged. *It is usual in such sales of this article to declare it to be sea-damaged*, and when nothing is said, it is supposed to be sound. Defendant then repacked it, and it was included in a catalogue of the auction sale, as "187 bags pimento, bonded," and at the foot was stated, "the goods to be seen as specified in the catalogue, and remainder at No. 36, Camomile Street." Defendant drew fair samples, which were exhibited to the bidders, by which the article appeared to be dusty, and of inferior quality; but no one could tell from the samples that the goods had been sea-damaged or repacked, either of which facts depreciates the value in the market. The catalogues were not distributed till the day before the sale, and no one had inspected the goods. The auctioneer made no addition nor comment on what was stated in the catalogue, and the plaintiff became the purchaser at 18*d.* per pound, which was *not more than a reasonable price, after taking into consideration the fact that it had been sea-damaged and repacked.* The jury said: "That the state of the goods ought to have been communicated by the defendant to the plaintiff," and found a verdict for him, subject to the point whether the action

*Jones v. Bowden.*  
Where usage required damage to be declared.

<sup>1</sup> 10 C. B. 591; 20 L. J., C. P. 76.

<sup>2</sup> 4 Taunt. 847.



was maintainable. A rule to set aside the verdict was discharged. The grounds are not very intelligibly given, but it may be fairly inferred from the language of Mansfield, C. J., that he considered the verdict of the jury as establishing a usage which imposed on the vendor the duty of disclosing the defect, thus bringing the case within the general principle stated by Bramwell, J., in *Horsfall v. Thomas*.<sup>1</sup>

Fraud, by collusion between vendor and buyer against third person; vendor prevented from recovering against buyer.  
*Jackson v. Duchaise.*

In the following very exceptional case, where the fraud of the vendor was committed not on the buyer, but by collusion with the buyer against another person, the vendor was not permitted to recover against the buyer.

In *Jackson v. Duchaise*,<sup>2</sup> the facts were that the plaintiff sold the goods in a house to the defendant for 100*l.*, but she could not raise the money; she applied to one Walsh, to aid her in the purchase, and he at her request agreed to buy them from the plaintiff for 70*l.*, which he did, taking a bill of sale to himself. By agreement between the plaintiff and the defendant, she was to pay the deficiency of 30*l.* to him, in two notes, of 15*l.* each, and this was concealed from Walsh. On action brought by plaintiff on one of the two notes, Lord Kenyon, at *Nisi Prius*, and the Court in banc afterwards, held the transaction to be a fraud on Walsh, and that plaintiff could not recover. The principle was the same as that on which secret agreements to give one creditor an advantage over others as an inducement to sign a composition in insolvency, are held fraudulent and void.<sup>3</sup>

Case decided in the Superior Court of Vermont—of fraud on buyer.

In the Supreme Court of the State of Vermont it was held to be fraudulent in a vendor to sell a horse having an internal malady of a secret and fatal character, not apparent by any external indications, but known to the seller, and known by him to be unknown to the buyer, if the malady was such as to render the horse of *no value*.<sup>4</sup>

<sup>1</sup> 1 H. & C. 90; 31 L. J., Ex. 322.  
See, also, *Parkinson v. Lee*, 2 East, 314.

<sup>2</sup> 3 T. R. 551.

<sup>3</sup> *Dalglish v. Tennent*, L. R. 2, Q. B. 49.

<sup>4</sup> *Paddock v. Strobbridge*, 29 Vermont, 470.

## SECTION IV.—FRAUD ON CREDITORS,—BILLS OF SALE.

Sales made by debtors in fraud of creditors are usually considered as being governed by the statute 13 Eliz. c. 5, and the decisions made under it; but other statutes had been previously passed on the same subject, and in *Cadogan v. Kennett*,<sup>1</sup> Lord Mansfield said that “the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4. The former of these statutes relates to creditors only: the latter to purchasers. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud.”

Statute of Elizabeth.

The 13 Eliz. c. 5, was intended “for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, *alienations*, &c., &c., as well of lands and tenements, as of *goods and chattels* \* \* \* devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to *delay, hinder, or defraud creditors* \* \* \* to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued.”

The statute, therefore, provides that all alienations, bargains, and conveyances of lands and tenements, or goods and chattels, made for any such intent and purpose as is above expressed, shall be “deemed and taken, (only against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous, or fraudulent devices and practices as is aforesaid, are, shall, or might be in anywise disturbed, hindered, delayed, or defrauded,) to be clearly and utterly void, frustrate, and of none effect.” This statute was confirmed

<sup>1</sup> Cowp. 432.

by 14 Eliz. c. 11, s. 1, and made perpetual by 29 Eliz. c. 5, s. 2. And it *seems* that it protects against fraudulent sales, subsequent creditors, as well as those having claims at the date of the fraudulent conveyance.<sup>1</sup>

*Semble*, protects future creditors.

Twyne's case.

In Twyne's case,<sup>2</sup> the celebrated leading case on this subject, the debtor had made a secret conveyance to Twyne by general deed of all his goods and chattels, worth 300*l.*, in satisfaction of a debt of 400*l.*, pending an action brought by another creditor for a debt of 200*l.* The debtor continued in possession of the goods, and sold some of them : and shorn the sheep and marked them with his own mark. The second creditor took the goods in execution, but Twyne resisted the sheriff, and Coke, the Queen's Attorney-General, thereupon filed an information against him in the Star Chamber. The learned author says in his report that " In this case divers points were resolved :

" 1. That this gift had the signs and marks of fraud, because the gift is general without exception of his apparel, or of any thing of necessity, for it is commonly said, *quod dolosus versatur in generalibus*.

" 2. The donor continued in possession, and used them as his own ; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

" 3. It was made in secret, *et dona clandestina sunt semper suspiciosa*.

" 4. It was made pending the writ.

" 5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and trust is the cover of fraud.

" 6. The deed contains that the gift was made honestly, truly, and *bonâ fide* ; *et clausulæ inconsuetæ semper inducunt suspicionem*.

" Secondly, it was resolved that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, \* \* \* yet it is not *bonâ fide*, for no gift shall be

<sup>1</sup> *Graham v. Furber*, 14 C. B. 410,      <sup>2</sup> 3 Coke, 80 ; 1 Smith's L. C. 1. and 23 L. J., C. B. 51.

deemed to be *bond fide* \* \* \* which is accompanied with any trust." Lord Coke therefore advises: "Reader, when any gift shall be made to you in satisfaction of a debt, by one who is indebted to others also; 1. Let it be made in a public manner, and before the neighbours, and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gifts, take the possession of them, for continuance of possession in the donor is the sign of trust. \* \*

"And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, *that all statutes made against frauds should be liberally and beneficially expounded to suppress the fraud:*

'Quæritur, ut crescunt tot magna volumina legis  
In promptu causa est, crescit in orbe dolus.'

In the application of the statute, a question of fact for the jury is constantly presented; namely, whether the transfer of the goods was *bond fide*, or fraudulent, that is "with the end, purpose, and intent to delay, hinder, or defraud creditors," as the Act expresses it. It was, indeed, held in some early cases, of which the leading one is *Edwards v. Harben*,<sup>1</sup> that under certain circumstances this was a question of law for the Court. The decision was given in that case by Buller, J., who said: "This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law: *that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent.*"<sup>2</sup> As this case does not appear ever to have been overruled,<sup>3</sup> though frequently mentioned un-

Conveyance fraudulent or not, question of fact for jury.

*Edwards v. Harben.*

<sup>1</sup> 2 T. R. 587.

<sup>2</sup> It was said to be good law by

<sup>3</sup> See, also, *Paget v. Perchard*, 1 Esp. 205; *Martin v. Perchard*, 2 W. Bl. 702. *Lawrence, J., in Steel v. Brown*, 1 Taunt. 382.

favourably, it may be assumed that the law would be held to be the same at the present time ; but it is to be observed that, in the guarded form in which the principle is announced, a case could scarcely arise in which it would be applicable, for it is difficult to suppose that an action would be tried where *nothing* would be shown beyond a bare conveyance without possession : where something of the relations of the parties, and the circumstances of their dealings, would not appear. Apart from this very exceptional case, the authorities are all in accordance in treating the question of *Fraus vel non*, as one of fact for the jury, even where the vendor remains in possession.

Latimer v.  
Batson.

In *Latimer v. Batson*,<sup>1</sup> an execution had been levied on the household furniture, wine, &c., of the Duke of Marlborough, at Blenheim, and an officer remained in possession some time, and then executed a bill of sale to the execution creditor, but the Duke prevailed on the latter to leave him in possession. The execution creditor afterwards sold the goods to the plaintiff Latimer for 700*l.*, and the plaintiff put a man-servant into the house. The Duke also remained there, and used the goods, as if no execution had been put in ; but the execution was known in the neighbourhood. The goods were then seized by a second creditor, and carried away. On these facts, Jervis contended that the judge ought to have directed the jury that if they thought the Duke remained in possession, the sale was void, citing *Wardall v. Smith*,<sup>2</sup> where Lord Ellenborough said that “ to defeat an execution by a bill of sale there must appear to have been a *bonâ fide*, substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owners of the goods. A concurrent possession with the assignor is colourable. There must be an *exclusive* possession under the assignment, or it is fraudulent and void as against creditors.” But the Court refused a new trial, affirming the propriety of the judge’s charge, he having told the jury that if they thought the sale to the plaintiff was *bonâ fide*, and the purchase-money really

<sup>1</sup> 4 B. & C. 652.

<sup>2</sup> 1 Camp. 332.

paid by him, he was entitled to a verdict; but if the purchase-money was really paid by the Duke, and the sale to the plaintiff colourable, they should find for defendant. Bayley, J., also held, in conformity with *Leonard v. Baker*,<sup>1</sup> *Watkins v. Birch*,<sup>2</sup> and *Jezeeph v. Ingram*,<sup>3</sup> that "*if goods seized under an execution are bonâ fide sold, and the buyer suffers the debtor to continue in possession of the goods, still they are protected against subsequent executions, if the circumstances under which he has the possession are known in the neighbourhood.*"

In *Martindale v. Booth*,<sup>4</sup> all the judges were of opinion that the continuance of possession in the vendor is not of itself sufficient to render void a sale of goods as fraudulent, especially where the possession is consistent with the deed which provides only for the future entry into possession by the purchaser, conditioned on the vendor's default; and in addition to the numerous cases there cited, those in the note<sup>5</sup> sufficiently establish the proposition that the *continued possession by the vendor of goods sold, is a fact to be considered by the jury as evidence of fraud, and is not in law a fraud per se.*

*Martindale v. Booth.*

That the notoriety of the sale is a strong circumstance to rebut the presumption of fraud even where the vendor retains possession, is shown by the cases quoted in the above opinion, delivered by Bayley, J., in *Latimer v. Batson*, to which may be added *Kidd v. Rawlinson*,<sup>6</sup> and *Cole v. Davies*.<sup>7</sup>

Notoriety of the sale rebuts presumption of fraud.

In the recent case of *Hale v. Metropolitan Omnibus Company*,<sup>8</sup> Vice-Chancellor Kindersley expressed the modern doctrine in these terms: "It was at one time attempted to lay down rules that particular things were indelible badges of fraud, but in truth every case must stand upon its own footing, and the Court or the jury must consider whether,

No general rule.—Every case decided on its own circumstances.

<sup>1</sup> 1 M. & S. 251.

<sup>2</sup> 4 Taunt. 823.

<sup>3</sup> 8 Taunt. 838.

<sup>4</sup> 3 B. & Ad. 498.

<sup>5</sup> *Lady Arundel v. Phipps*, 10 Ves. J. 145; *per Buller, J.*, in *Hazeling-*

*ton v. Gill*, 3 T. R. 620, note *a*;

*Linden v. Sharp*, 6 M. & G. 895-898;

*Pennell v. Dawson*, 18 C. B. 355.

<sup>6</sup> 2 Bos. & P. 59.

<sup>7</sup> 1 Ld. Raym. 724.

<sup>8</sup> 30 L. J., Ch. 777.

having regard to all the circumstances, the transaction was a fair one, and intended to pass the property for a valuable consideration."

Mere intent to defeat execution.

It is well settled that the mere intention to defeat the execution of a creditor will not avoid a sale as fraudulent, if it be made *bonâ fide* for a valuable consideration.<sup>1</sup> Nor is it a fraud to mortgage personal property for money actually lent to the mortgagor, even though the mortgagor's intention may be thus to defeat the expected execution of a judgment creditor;<sup>2</sup> nor to confess a judgment in favour of one creditor for the purpose of giving him a preference over another who is on the eve of issuing execution on a judgment previously obtained.<sup>3</sup>

Confession of judgment, with intent to give preference.

Bills of Sale Act, 17 & 18 Vict. c. 36; 29 & 30 Vict. c. 96.

The statute of 17 & 18 Vict. c. 36, called the "Bills of Sale Act, 1854" (as amended by 29 & 30 Vict. c. 96), has rendered obsolete a part of the law under the statute of 13 Eliz. c. 5, so far as relates to the transfer of chattels. The first of these acts is entitled, "An act for preventing frauds upon creditors, by secret bills of sale of personal chattels;" and it provides that, "every bill of sale of personal chattels made after the passing of this Act, either absolutely or conditionally, or subject or not subject to any trusts, and whereby the grantee or holder shall have power, either with or without notice, and either immediately after the making of such a bill of sale, or at any future time, to seize and take possession of any property and effects comprised in or made subject to such bill of sale, and every schedule or inventory which shall be therein annexed or therein referred to, or a true copy thereof, and of every attestation of the due execution thereof, shall, together with an affidavit of the time of such bill of sale being made or given, and a description of the residence and occupation of the person making or giving the same, or in case the same shall be made or given by any person under or in execution of any process,

<sup>1</sup> Wood v. Dixie, 7 Q. B. 892;  
Riches v. Evans, 9 C. & P., 640;  
Hale v. Metropolitan Omnibus Com-  
pany, 30 L. J., Ch. 777.

<sup>2</sup> Darvill v. Terry, 6 H. & N. 807,  
and 30 L. J., Ex. 355.

<sup>3</sup> Holbird v. Anderson, 5 T. R.  
235.

then a description of the residence and occupation of the person against whom such process shall have issued, and of every attesting witness to such bill of sale, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days after the making or giving such bill of sale (in like manner as a warrant of attorney in any personal action given by the trader is now by law required to be filed)." The section then goes on to declare that in default of such registry the bill of sale shall be null and void to all intents and purposes whatsoever, so far as regards the property in or right of possession of the goods sold which remained in the apparent possession of the vendor, against:—1st, his assignees in bankruptcy or insolvency<sup>1</sup>: 2nd, his assignees in any assignment for the benefit of creditors: 3rd, sheriff's officers and others seizing under execution: and 4th, all persons in whose behalf process of execution has issued. The Act makes further provisions for the registry of such bills of sale, and for the delivery of copies and extracts.

The Bills of Sale Act, 1866 (29 & 30 Vict. c. 96), requires a renewal of the registration every five years, in default of which the registration ceases to be of any effect.

Neither the statute of Elizabeth nor the Bills of Sale Act renders the contract void *between the parties*, and the latter Act carefully enumerates those third persons who shall remain unaffected by the contract, where the forms and requisites rendered necessary by the act have not been complied with. Without these provisions, however, it would not be competent to either party to impeach the provisions of such a contract on the ground that it was intended as a fraud on creditors,<sup>2</sup> for the general principle of law that no man shall set up his own fraud as the basis of a right or claim for his own benefit would clearly apply.<sup>3</sup> But even as to creditors,

Contract not voidable between the parties.

<sup>1</sup> The liquidator of a company is not comprehended in these provisions as being an assignee in bankruptcy or insolvency. *Re Marine Mansions Co.*, L. R. 4, Eq. 601.

<sup>2</sup> *Bessey v. Windham*, 6 Q. B. 166; *Doe dem. Roberts v. Roberts*, 2 B. & Ald. 367.

<sup>3</sup> *Ibid.* *Philpotts v. Philpotts*, 10 C. B. 85; 20 L. J., C. P. 11.



Voidable, not void as to creditors.

Title of *bona fide* third persons acquired from transferee good against creditors.

Sheriff liable as trespasser, unless he show both judgment and writ.

Second section, as to declarations of trust—applies to vendor and vendee, not to vendee and stranger.

Object of the statute.

such conveyances are not *void*, but *voidable*, and the creditors must, as in all analogous cases, elect whether they will treat their debtor's conveyance as valid or defeasible. If the transferee makes a conveyance to a *bona fide* third person for a valuable consideration, before the bill of sale is impeached by creditors as being in fraud of their rights, the title of such *bona fide* third person will not be disturbed.<sup>1</sup>

Under the statute of Elizabeth it was held in various cases that as the transfer was good not only between the parties, but as against strangers, not creditors, the sheriff would be held liable as a trespasser if he seized the goods on execution against the vendor, unless he put in evidence the writ to show that he was acting for a creditor;<sup>2</sup> and in *White v. Morris*,<sup>3</sup> it was held, overruling *Bessey v. Windham*,<sup>4</sup> that it was necessary for the sheriff to produce, in evidence, the judgment as well as the writ, in order to defend himself in such cases.

The second section of the Bills of Sale Act provides that every defeasance or condition, or declaration of trust, when not contained in the body of the bill of sale, must be written on the same paper, in default whereof the bill of sale will be void, as provided in the first section.

In *Robinson v. Collingwood* <sup>4</sup> it was held, that this section applied only to declarations of trust between the vendor and the vendee, not to one between the vendee and a stranger to the vendor.

The decisions upon this statute have established that the object of the forms and requisites prescribed in it was to afford to creditors and parties interested a true idea of the position in life of the vendor, and to give such a description of the residence and occupation of the vendor and witnesses as would enable persons interested in the matter to trace out who is the person giving the bill of sale, and who the witnesses are, so as to ascertain the *bona fides* of the trans-

<sup>1</sup> *Morewood v. South Yorkshire Railway Company*, 3 H. & N. 799; 28 L. J., Ex. 114. 6 Q. B. 166; *Glave v. Wentworth*, 6 Q. B. 173, n.

<sup>2</sup> *Doe dem. Roberts v. Roberts*, 2 B. & Ald. 367; *Bessey v. Windham*, 185. <sup>3</sup> 11 C. B. 1015, and 21 L. J., C. P. 185. <sup>4</sup> 34 L. J., C. P. 18.

action.<sup>1</sup> Any misdescription or non-description in these particulars will, therefore, vitiate the bill of sale. Description of vendor and witnesses.

Among the very numerous cases which have been decided on this point, the following are selected as fair examples :

It has been held insufficient to describe as "gentleman" only, a clerk in the audit office,<sup>2</sup> or an attorney's clerk,<sup>3</sup> or silk-buyer,<sup>4</sup> but such a description was held sufficient where the party had no occupation.<sup>5</sup> Description of occupation.

And it will not be sufficient for the affidavit to refer to the bill of sale for the necessary description of the vendor's residence and occupation, but they must be repeated in the affidavit,<sup>6</sup> so that where the affidavit described the deponent as "the said J. B., of No. 9, George Street, in the said bill of sale mentioned," it was held insufficient, because not stating his occupation of hotel-keeper.<sup>7</sup> Must be repeated in affidavit.

The residence of the witness has been held sufficiently indicated by giving his place of business, without describing the place where he sleeps.<sup>8</sup> Description of residence.

A residence described as "New Street, Blackfriars, in the County of Middlesex," without adding the "City of London," was held sufficient;<sup>9</sup> and in *Briggs v. Boss*,<sup>10</sup> the attesting witness stated: "I reside at Hanley, in the county of Stafford, and am an accountant," and this was held sufficient both as to residence and occupation, although it was proven that Hanley was a borough containing 40,000 Briggs v. Boss.

<sup>1</sup> *Per* Blackburn, J., in *Briggs v. Boss*, L. R., 3 Q. B. 268-270.

<sup>2</sup> *Allen v. Thompson*, 1 H. & N. 15; 25 L. J., Ex. 249.

<sup>3</sup> *Tuton v. Sanoner*, 3 H. & N. 280; 27 L. J., Ex. 253; *Beales v. Tennent*, 29 L. J., Q. B. 188.

<sup>4</sup> *Adams v. Graham*, 33 L. J., Q. B. 71.

<sup>5</sup> *Morewood v. South Yorkshire Railway Company*, 3 H. & N. 798; 28 L. J., Ex. 114; *Bath v. Sutton*, 3 H. & N. 382; 27 L. J., Ex. 388; *Nicholson v. Cooper*, 3 H. & N. 384; *London Loan Company v. Chace*, 12 C. B., N. S. 730; 31 L. J., C. P. 314.

<sup>6</sup> *Hatton v. English*, 7 E. & B. 94;

26 L. J., Q. B. 161.

<sup>7</sup> *Pickard v. Bretts*, 5 H. & N. 9; 29 L. J., Ex. 18. See, also, *Wilcoxon v. Taylor*, 5 H. & N. 202; 29 L. J., Ex. 154.

<sup>8</sup> *Attenborough v. Thompson*, 2 H. & N. 559; 27 L. J., Ex. 23; *Blackwell v. England*, 8 E. & B. 56; 27 L. J., Q. B. 124.

<sup>9</sup> *Hewer v. Cox*, 3 E. & B. 428; 30 L. J., Q. B. 73.

<sup>10</sup> L. R. 3, Q. B. 268; 37 L. J., Q. B. See, also, *Blackwell v. England*, 8 E. & B. 541; 27 L. J., Q. B. 124; *Re Hams*, 10 Ir. Ch. Rep. 100; 1 L. T., N. S. 467.

inhabitants, and although the deponent was a clerk of an accountant residing in Manchester, whose name was over the door of the place of business in Hanley; these facts being overcome by proof, first, that hundreds of letters reached the deponent addressed Hanley only; and, secondly, that although he was only a clerk at Hanley for the Manchester accountant, he was allowed by his employer to do business occasionally on his own account.

Affidavit to  
"best of be-  
lief."

An affidavit describing the vendor's residence and occupation to the "best of the belief" of the witness, was held sufficient by the Exchequer of Pleas, in *Roe v. Bradshaw*.<sup>1</sup>

Trading com-  
pany may give  
bill of sale.

In *Shears v. Jacobs*,<sup>2</sup> it was held that a trading company is competent to give a bill of sale, and that an affidavit describing the company as "The Glucose Sugar and Coloring Company," and giving the address of its principal office, was a sufficient compliance with the Act.

Registry not  
necessary where  
goods have been  
taken by credi-  
tor in execution  
within 21 days.  
*Marples v.*  
*Hartley*.

In *Marples v. Hartley*,<sup>3</sup> the facts were that a bill of sale was given on the 27th June, and a creditor's execution levied on the 5th July, within the twenty-one days allowed for registration. The purchaser did not register at all. Held, that his title under the bill of sale was good; the Court declaring that "two things are required before the requirements of the statute need be complied with: the apparent possession of the goods, and the lapse of the twenty-one days. The assignee has the period of twenty-one days, within which he may complete his title by registering the bill of sale; but if he takes possession under it in the mean time, he need not register at all. Here, it was not invalidated at the time the goods were received by the sheriff. It therefore gave the claimant a good title to the goods till he had so seized them, or had registered it within the twenty-one days."

Act not appli-  
cable to ships,  
nor sales in  
usual course of  
business, nor

The Bills of Sale Act does not include transfers of ships or parts thereof, *transfers in the ordinary course of trade or calling, sales of goods at sea* or in foreign ports, bills of

<sup>1</sup> L. R. 1, Ex. 106; 35 L. J., Ex. 71.

<sup>2</sup> 1 B. & S. 1; 30 L. J., Q. B. 92. See, also, *Banbury v. White*, 2 H. &

<sup>3</sup> L. R. 1, C. P. 513; 35 L. J., C. P. 241.

C. 300; 31 L. J., Ex. 258.

lading, India warrants, warehousemen's certificates, warrants for delivery of goods, or any document used in the ordinary course of business as proof of the possession or control of goods, or authorising the holder to transfer or receive the goods thereby represented, or shares in public stocks, or in joint-stock or incorporated companies, or choses in action.<sup>1</sup>

goods at sea,  
bills of lading,  
&c.

The decisions on the validity of transfers of *future property* under bills of sale have already been considered, Book I., Part 1, Ch. 4, *Of the thing sold*.

Where machinery on land is mortgaged together with the land, this does not constitute a bill of sale of the machinery: but where machinery is only trade fixtures, and is conveyed by bill of sale distinct from the land mortgaged, the Bills of Sale Act applies.<sup>2</sup>

Machinery.

A receipt for money by a husband to the trustees of his wife's settlement, "for the purchase of my household goods contained in the enclosed inventory," was held not to be a bill of sale in the case of *Allsop v. Day*.<sup>3</sup>

Receipt by  
husband for  
money of his  
wife for pur-  
chase of house-  
hold goods.

Contracts of sale will also be avoided as fraudulent against creditors when made in furtherance of an attempt to disturb the principles on which the bankrupt and insolvent laws of the country are based, the object of these laws being to secure an equal rateable distribution of the debtor's property among his creditors. All contracts, including that of sale, are voidable as fraudulent when made for this purpose. In all contracts between an insolvent and his creditors, the law imports a tacit stipulation that all shall share alike, *pari passu*; and that it shall not be competent for any one of them, without the knowledge of the rest, to secure any benefit or advantage in which they have no share.<sup>4</sup>

Sale for purpose  
of disturbing  
equality among  
creditors.

<sup>1</sup> 17 & 18 Vict. c. 36, s. 7.

<sup>2</sup> *Mather v. Fraser*, 25 L. J., Ch. 361; *Waterfall v. Penistone*, 6 E. & B. 876; and 26 L. J., Q. B. 100.

<sup>3</sup> 7 H. & N. 457; and 31 L. J., Ex. 105.

<sup>4</sup> *Daughish v. Tennents*, L. R. 2, Q. B. 49; 36 L. J., Q. B. 10; *Howden v. Haigh*, 11 A. & E. 1033; *Higgins v. Pitts*, 4 Ex. 312; *Wilson v. Ray*, 10

A. & E. 82; *Leicester v. Rose*, 4 East, 371; *Mallalieu v. Hodgson*, 16 Q. B. 689; 20 L. J., Q. B. 339; *Britten v. Hughes*, 5 Bingh. 460; *Coleman v. Waller*, 3 Y. & J. 212; *Wells v. Girling*, 1 B. & B. 447. See, also, *Jackson v. Duchaise*, 3 T. R. 551; and the recent case of *Nunes v. Carter*, L. R. 1, Priv. C. 342, for an instructive opinion of Lord West-

Return of goods to unpaid vendor by an insolvent.

In this connection it may be useful to refer to a class of cases which will again come under consideration in the chapter treating of *Stoppage in transitu*. The equity in favour of returning goods to an unpaid vendor by a buyer who finds that he is insolvent, and will be unable to pay for them, is so strong in its appeal to the conscience of honest men, that cases have frequently arisen where the buyer, on becoming insolvent, has attempted to prevent the goods from being fused into the common mass of assets by rejecting them, or rescinding the sale, and returning the goods.

Early cases sanctioned rescission of sales after delivery to buyer, if before an act of bankruptcy.

In some early cases, before the principles were well settled, countenance was given to the idea that a buyer might *rescind* a sale after its performance by the actual delivery of the goods into his possession, if the rescission was accomplished, and the goods returned to the vendor, before the buyer committed an act of bankruptcy. The earliest case on the subject was *Atkin v. Barwick*,<sup>1</sup> variously reported, and of which a full account was given by Lord Abinger in his dissenting opinion in *James v. Griffin*.<sup>2</sup> But although this case subsequently received countenance in *Alderson v. Temple*,<sup>3</sup> in *Harman v. Fisher*,<sup>4</sup> and various other cases, and was made the basis of the decision in *Salte v. Field*,<sup>5</sup> yet the *ratio decidendi* was constantly questioned, and it is now perfectly well settled that if the insolvent vendee has come into actual possession of the goods, he cannot *rescind* the contract and return the goods to the vendor, for that would be a clearly fraudulent preference in favour of the vendor. This was first distinctly held by Lord Kenyon and the King's Bench, in *Barnes v. Freeland*,<sup>6</sup> almost immediately after the decision given by them in *Salte v. Field*,<sup>5</sup> and the question now always turns upon the point

Overruled in later cases.

bury, on the construction of statutes setting aside sales made in contemplation of bankruptcy.

<sup>1</sup> 1 Stra. 165; 10 Mod. 432; Fortes. 353.

<sup>2</sup> 2 Mees. & W. 623—639.

<sup>3</sup> 4 Burr. 2235.

<sup>4</sup> Cowp. 117.

<sup>5</sup> 5 T. R. 211.

<sup>6</sup> 6 T. R. 80. See, also, *Neate v. Ball*, 2 East, 123; *Richardson v. Goss*, 3 B. & P. 119; *Heinecke v. Erle*, in Cam. Scacc. 8 E. & B. 410; 28 L. J., Q. B. 79.

whether—First, the buyer has left anything undone for the perfect transfer of the *property* to himself, in which case, the sale being incomplete, he may honestly decline to complete it to the prejudice of his vendor; or, secondly, whether, although the transfer of the property be complete, the transit into his *possession* remains incomplete, in which event he may honestly refuse the possession, so as to leave to his vendor the right of stoppage *in transitu*, which will be equally available to the latter if he can accomplish it before the assignees get possession of the goods.

Now only permissible if, 1st, the property has not completely passed;

or, 2ndly, possession has not been taken by buyer.

An instance of the first kind is given in *Nicholson v. Bower*,<sup>1</sup> where wheat was purchased by sample, and forwarded to the purchaser by railway, and on arrival at the railway warehouse, a bulk-sample was taken to the purchaser by his orders, and found to correspond, but the purchaser, knowing himself to be insolvent, told his carman, "Don't cart it home at present." The sale was by parol, and the impression of the judges evidently was, that the transit was at an end, so that the vendor's right of stoppage was gone: but the value being over 10*l.*, the sale was incomplete under the Statute of Frauds, unless the vendor had *accepted* as well as received the goods, and although it might be his duty to accept when he found that the bulk accorded with the sample according to his verbal agreement, yet if he chose not to accept, the sale was incomplete, and his object of returning the goods to his vendor would thus be accomplished. In the language of Erle, J., in commenting on the buyer's action, "The meaning of all this seems to be this:—'I will hold my hand: in honesty the wheat ought to go back as I cannot pay for it;' and he sends the next day a notice to the vendor, and is willing that it should get back to him, if by law it might. The bankrupt broke his contract, mayhap, by not accepting, but that does not show that there *was* an acceptance."

*Nicholson v. Bower.*

But even if the *property* has passed, it may be that the

<sup>1</sup> E. & E. 172; 28 L. J., Q. B. 97; and see *Richardson v. Goss*, 3 B. & P. 119.

*possession* is not yet obtained, and the buyer may then honestly reject it without exposing himself to the charge of giving an undue preference to one creditor over the others. The different cases in which buyers have adopted this course and thus kept unimpaired the vendor's right of stoppage *in transitu*, are referred to in the note.<sup>1</sup>

Dixon v.  
Baldwin.

The reader is also referred to a very singular case, that of *Dixon v. Baldwin*,<sup>2</sup> where the King's Bench decided that although the transit was at an end, and although both the property and possession were confessedly in the vendee, yet under the special circumstances of the case, the buyer had not laid himself open to a charge of fraudulent preference by rescinding the contract, because it was done by advice of counsel, after a statement of his intention to do so, made to his creditors at a meeting called by him, and not done with the voluntary intention of giving an undue advantage. The judges were not unanimous, and the question was considered by the majority rather as one of fact than of law.

Decisions in  
America.  
Edwards v.  
Harben fol-  
lowed.

In America, it is somewhat remarkable that the ruling of the King's Bench, in *Edwards v. Harben*,<sup>3</sup> has not only been followed to its full extent, but the doctrine has been pushed even beyond the principle there established. Chancellor Kent erroneously supposes the English law to be unsettled on the question,<sup>4</sup> but he states it to be the established law in the Federal Courts of the United States, that an absolute bill of sale is *itself* a fraud in law unless possession accompanies and follows the deed; and in a recent case<sup>5</sup> it was even decided that the *bona fides* of the trans-

<sup>1</sup> *Atkins v. Barwick*, 1 Str. 165; 10 Mod. 432; *Fortes*, 353; *Salte v. Field*, 5 T. R. 211; *Bartram v. Farebrother*, 4 Bing. 579; *Smith v. Field*, 5 T. R. 402; *James v. Griffin*, 2 M. & W. 628; *Siffken v. Wray*, 6 East, 371; *Heincke v. Erle & al.*, 28 L. J., Q. B. 79; and 8 E. & B. 410; *Bolton v. Lancashire and York Railway Company, L. R.*, 1 C. P. 431; 35 L.

J., C. P. 137; *Whitehead v. Anderson*, 9 M. & W. at p. 529. See remarks of Parke, B., in *Van Casteel v. Brooker*, at p. 14; 18 L. J., Ex. 9.

<sup>2</sup> 5 East, 175.

<sup>3</sup> 2 T. R. 587.

<sup>4</sup> 2 Kent, 521.

<sup>5</sup> *The Romp, Olcott's Adm.* 196, cited in note at p. 697, 2nd Kent, 11th

action between the parties and the fact that possession remained with the vendor for justifiable purposes, would not suffice to render the sale valid. This seems also to be the doctrine of the State Courts in Virginia, South Carolina, Pennsylvania, Illinois, New Jersey, Vermont, and Connecticut, while the English rule pervades the other States.



## CHAPTER III.

### ILLEGALITY.

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#### SECTION I.—AT COMMON LAW.

Sale void when entered into for illegal purpose.

THE contract of sale, like all other contracts, is void when entered into for an illegal consideration or for purposes violative of good morals or prohibited by the law giver. The thing sold may be such as in its nature cannot form the subject of a valid contract of sale, as an obscene book or an indecent picture, which are deemed by the com-

mon law to be evil and noxious things. The article sold may be in its nature an innocent and proper subject of commercial dealings, as a drug, but may be knowingly sold for the purpose, prohibited by law, of adulterating food or drink. Or the sale may be prohibited by statute for revenue purposes, or other motive of public policy. In all these cases the law permits neither party to maintain an action on such a sale.

The subject will be considered in two parts: 1st, with reference to the common law; 2nd, the Acts of Parliament.

At common law the rule is invariable: *Ex turpi causa non oritur actio*. And this rule is as applicable to a plea as to a declaration; for, as was said by Lord Mansfield in *Montefiori v. Montefiori*,<sup>1</sup> "no man shall set up his own iniquity as a defence any more than as a cause of action."<sup>2</sup> Sales are therefore void, and neither party can maintain an action on them, if the thing sold be contrary to good morals or public decency. Sales of an obscene book,<sup>3</sup> and of indecent prints or pictures,<sup>4</sup> have been held illegal and void at common law.

Illegal act unavailable for defence as well as for action.

Even where part only of the consideration of a contract is illegal, the whole contract is void and cannot be enforced. This was treated as established law by Tindal, C. J., in *Waite v. Jones*,<sup>5</sup> on the authority of *Featherston v. Hutchinson*;<sup>6</sup> and was affirmed by all the judges who delivered opinions in the Exchequer Chamber in *Jones v. Waite*.<sup>7</sup>

Consideration illegal in part.

So in *Scott v. Gillmore*,<sup>8</sup> a bill of exchange was held void where part of the consideration was for spirits sold in violation of the Tippling Acts. But in *Crookshank v. Rose*,<sup>9</sup> where the action was brought on a promissory note and a

<sup>1</sup> 1 Wm. Bl. 363; and see, also, *Doe dem. Roberts v. Roberts*, 2 B. & Ald. 367.

<sup>2</sup> See the authorities collected in the notes to the leading case of *Collins v. Blantern*, in 1 Sm. L. C. 325.

<sup>3</sup> *Poplett v. Stockdale, Ry. & Moo.* 337.

<sup>4</sup> *Fores v. Johns*, 4 Esp. 97.

<sup>5</sup> 1 Bing. N. C. 656.

<sup>6</sup> Cro. Eliz. 199.

<sup>7</sup> 5 Bing. N. C. 341. See, also, *Shackell v. Rozier*, 2 Bing. N. C. 634; and *Hopkins v. Prescott*, 4 C. B. 578.

<sup>8</sup> 3 Taunt. 226.

<sup>9</sup> 5 C. & P. 19.

bill of exchange given at the same time in payment of a sailor's bill to his landlord, in which were items for spirits sold illegally, it appeared that the whole amount of the charge for spirits was *less than either of the two securities*; and Lord Tenterden held that one security might be recovered because the plaintiff had the right to appropriate the other to all the illegal charges, which it was more than sufficient to cover.

And the principle does not apply to cases in which the Court determines covenants in restraint of trade to be illegal because unreasonable; for in such cases the Courts will enforce the covenants so far reasonable, and reject only the excess.<sup>1</sup>

Sale of thing innocent in itself, when vendor knows it is intended for illegal purpose.

The sale of a thing in itself an innocent and proper article of commerce is void when the vendor sells it, knowing that it is intended to be used for an immoral or illegal purpose. In several of the earlier cases something more than this mere knowledge was held necessary, and evidence was required of an intention on the vendor's part to aid in the illegal purpose, or profit by the immoral act. The later decisions overrule this doctrine, as will appear by the authorities now to be reviewed.

Faikney v. Reynous.

In *Faikney v. Reynous*,<sup>2</sup> which came before the King's Bench in 1767, a party had paid, at the request of another, money on a contract, which was illegal, and sued for its recovery. Judgment was given for the plaintiff, Lord Mansfield saying: "One of these two persons has paid money for the other, and on his account, and he gives him his bond to secure the *repayment* of it. This is not prohibited. *He is not concerned in the use which the other makes of the money.*"

Petrie v. Hannay.

This case was followed, in 1789, by the judges in *Petrie v. Hannay*,<sup>3</sup> but with evident reluctance, and many expressions of hesitation, especially by Lord Kenyon. Much stress was laid in both decisions upon a supposed distinction be-

<sup>1</sup> See the cases of *Mallon v. May*,  
*Green v. Price*, and others cited *post*,  
'*Restraint of Trade*,' p. 396.

<sup>2</sup> 4 Burr. 2070.

<sup>3</sup> 3 T. R. 418.

tween the law applicable to the case of a contract which was *malum in se*, and one which was *malum prohibitum*.

These two cases were repeatedly questioned and disapproved, as will be seen by reference to *Booth v. Hodgson*,<sup>1</sup> *Aubert v. Maze*,<sup>2</sup> *Mitchell v. Cockburne*,<sup>3</sup> *Webb v. Brooke*,<sup>4</sup> and *Langton v. Hughes*;<sup>5</sup> and in these, as well as in many subsequent cases, the distinction drawn between a thing, *malum in se* and *malum prohibitum* was overruled.

*Malum in se.*  
*Malum prohibitum.*

In 1803, the case of *Bowry v. Bennet*<sup>6</sup> was tried before Lord Ellenborough. A prostitute was sued for the value of clothes furnished, and pleaded that the plaintiff well knew her to be a woman of the town, and that the clothes in question were for the purpose of enabling her to pursue her calling. His Lordship said: "It must not only be shown that he had notice of this, but that he expected to be paid from the profits of the defendant's prostitution, and that he sold the clothes to enable her to carry it on, so that he might appear to have done something in furtherance of it."

*Bowry v. Bennet.*

In 1813, *Hodgson v. Temple*,<sup>7</sup> was decided. There the action was for the price of spirits, sold with the knowledge that defendant intended to use them illegally. There was a verdict for plaintiff, and a motion for new trial was refused by the Court, Sir James Mansfield saying: "This would be carrying the law much further than it has ever yet been carried. The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment, but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction."

*Hodgson v. Temple.*

This decision was given in November, 1813, and is the more remarkable because the case of *Langton v. Hughes*<sup>8</sup> had been decided exactly to the contrary, in the King's

*Langton v. Hughes.*

<sup>1</sup> 6 T. R. 405.

<sup>2</sup> 2 Bos. & P. 371.

<sup>3</sup> 2 H. Bl. 379.

<sup>4</sup> 3 Taunt. 6.

<sup>5</sup> 1 M. & S. 594.

<sup>6</sup> 1 Camp. 348. See, also, *Lloyd v. Johnson*, 1 B. & P. 340; and *Crisp*

*v. Churchill*, there cited in argument; *Girardey v. Richardson*, 1 Esp. 13; *Jennings v. Throgmorton*, Ry. & Moo. 251; and *Appleton v. Campbell*, 2 C. & P. 347.

<sup>7</sup> 5 Taunt. 181.

<sup>8</sup> 1 M. & S. 593.

Bench, in the month of June, in the same year, and was not noticed by the counsel or the Court in *Hodgson v. Temple*. *Langton v. Hughes* was first tried before Lord Ellenborough at Nisi Prius. It was an action for the price of drugs sold to the defendants, who were brewers, the plaintiff knowing that defendants intended to use the drugs for mixing with beer, a use prohibited by statute. His Lordship charged the jury that the plaintiffs in *selling drugs to the defendants, knowing that they were to be used contrary to the statute, were aiding them in the breach of that act*, and therefore not entitled to recover. He, however, reserved the point. The ruling was maintained by all the judges, and it was distinctly asserted as the true principle, that "parties who seek to enforce a contract for the sale of articles, which in themselves are perfectly innocent, but which *were sold with a knowledge that they were to be used for a purpose which is prohibited by law*, are not entitled to recover."<sup>1</sup>

*Cannan v.  
Bryce.*

The leading case of *Cannan v. Bryce*,<sup>2</sup> was decided in the King's Bench in 1819. The question was whether money loaned for the purpose of enabling a party to pay for losses and compounding differences on illegal stock transactions could be recovered. All the previous cases were reviewed, and the Court took time to consider. The opinion was delivered by Abbott, C. J., and the principle was stated as follows: "The statute in question has absolutely prohibited the payment of money for compounding differences (*i.e.* in stock-bargains); it is impossible to say that making such payment is not an unlawful act; and if it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? It will be recollected that I am speaking of a case wherein the means were furnished with a *full knowledge of the object to which they were to be applied*, and for the express purpose of accomplishing that object." The money loaned was, therefore, held not recoverable. The case of *Langton v. Hughes* was approved and followed, while *Faikney v. Reynous* and *Petrie v. Hannay*

<sup>1</sup> *Per Le Blanc, J.*, and see the *Lightfoot v. Tennant*, 1 B. & P. 551. strong observations of Eyre, C. J., in <sup>2</sup> 3 B. & Ald. 179.

were practically overruled, and the distinction between *malum prohibitum* and *malum in se* pointedly repudiated.

In *McKinnell v. Robinson*,<sup>1</sup> in the Exchequer, in 1838, it was held, that money knowingly lent for gambling at a game prohibited by law, could not be recovered, the case of *Cannan v. Bryce* being referred to by the Court as the decisive authority on this subject.

*McKinnell v. Robinson.*

The latest case, that of *Pearce v. Brooks*,<sup>2</sup> was decided in the same Court in 1866. The plaintiff had supplied a brougham to a prostitute. The evidence showed that the plaintiff knew the defendant to be a prostitute, but there was no *direct* evidence that plaintiff knew that the brougham was intended to be used for the purpose of enabling the defendant to follow her vocation; and there was *no* evidence that plaintiff expected to be paid out of the wages of prostitution. The jury found that the defendant did hire the brougham for the purpose of her prostitution, and that the plaintiff *knew it was supplied for that purpose*. It was held, First, not necessary to show that plaintiff expected to be paid from the proceeds of the immoral act; Secondly, that *the knowledge by the plaintiff that the woman was a prostitute being proven, the jury were authorised in inferring that the plaintiff also knew the purpose for which she wanted an ornamental brougham*; and thirdly, that *this knowledge was sufficient to render the contract void*, on the authority of *Cannan v. Bryce*, which was recognised as the leading case on the subject.

*Pearce v. Brooks*

By the common law, a sale to an alien enemy is void, all commercial intercourse being strictly prohibited with an alien enemy, save only when specially licensed by the sovereign.<sup>3</sup>

*Sale to an alien enemy.*

Smuggling contracts are also illegal, and where a party in England sent an order to Guernsey for goods, which were to be smuggled into this country, the Court held that the plaintiffs, who were Englishmen, residing here, and partners of the vendor in Guernsey, were not entitled to recover.<sup>4</sup>

*Smuggling contracts. Biggs v. Lawrence.*

<sup>1</sup> 3 M. & W. 435.

<sup>2</sup> *Brandon v. Nesbitt*, 6 T. R. 23.

<sup>3</sup> L. R. 1, Ex. 212.

<sup>4</sup> *Biggs v. Lawrence*, 3 T. R. 454.

Holman v.  
Johnson.  
Sale completed  
abroad.

This case was followed in *Clugas v. Penaluna*.<sup>1</sup> But where the plaintiff, a foreigner, sold goods abroad to the defendant, knowing his intention to smuggle them, but having no concern in the smuggling scheme itself, the Court of King's Bench held, that the sale was complete abroad; was governed by foreign law; was not immoral nor illegal *there*, because no country takes notice of the revenue laws of another; that the goods were not sold to be delivered in England, but were actually delivered in the foreign country, and that the plaintiff was therefore entitled to recover.<sup>2</sup>

Waymell v.  
Reed.  
Sale abroad,  
where vendor  
assists the  
smuggler.

In *Waymell v. Reed*,<sup>3</sup> the goods were sold abroad, and plaintiff invoked the decision in *Holman v. Johnson*, but was not permitted to recover, because he had aided the purchaser in his smuggling purposes, by packing the goods in a particular manner, so as to evade the revenue.

Pellecat v.  
Angell.  
Distinction in  
sales made in  
foreign coun-  
tries, when  
vendor does or  
does not aid the  
smuggler.

In *Pellecat v. Angell*,<sup>4</sup> the subject again came before the Exchequer Court, and the previous decisions were followed, the Court pointing out that the true distinction was this: Where the foreigner takes an actual part in the illegal adventure, as in packing the goods in prohibited parcels, or otherwise, the contract will not be enforced; but the mere sale of goods by a foreigner in a foreign country, made with the knowledge that the buyer intends to smuggle them into this country, is not illegal, and may be enforced.

Contracts  
against public  
policy.

At common law, also, certain contracts are prohibited as being against public policy. Most of these are not properly within the scope of this treatise, such as contracts in restraint of marriage; marriage brokerage contracts; contracts compounding felonies, &c. Confining our attention to sales illegal at common law, because contravening or supposed to contravene considerations of public policy, it is impossible not to be impressed with the force of the observations made by the judges in *Richardson v. Mellish*,<sup>5</sup> and by Lord Camp-

<sup>1</sup> 4 T. R. 466.

<sup>4</sup> 2 C. M. & R. 311.

<sup>2</sup> *Holman v. Johnson*, 1 Cowp. 341.

<sup>5</sup> 2 Bingh. 242.

<sup>3</sup> 5 T. R. 599.

bell in *Hilton v. Eckersley*,<sup>1</sup> as well as the striking illustrations presented in the reports of the justice of their strictures. Best, C. J., said: "I am not much disposed to yield to arguments of public policy: I think the Courts of Westminster Hall (speaking with deference, as an humble individual like myself ought to speak, of the judgments of those who have gone before me), have gone much further than they were warranted in going, on questions of policy. They have taken on themselves sometimes to decide doubtful questions of policy, and they are always in danger of so doing, because courts of law look only at the particular case, and have not the means of bringing before them all those considerations which enter into the judgment of those who decide on questions of policy. \* \* \* I admit that if it can be clearly put upon the contravention of public policy, the plaintiff cannot succeed: but it must be unquestionable: there must be no doubt." Burroughs, J., joined in the protest of the Chief Justice "against arguing too strongly upon public policy: it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

In *Hilton v. Eckersley*,<sup>1</sup> the judges differed in opinion as to what public policy really was in the case before them; and Lord Campbell said: "I enter upon such considerations with much reluctance, and with great apprehension, when I think how different generations of judges, and different judges of the same generation, have differed in opinion upon questions of political economy and other topics connected with the adjudication of such cases; and I cannot help thinking that where there is no illegality in bonds and other instruments at common law, it would have been better that our courts of justice had been required to give effect to them, unless where they are avoided by Act of Parliament."

An illustration of the justice of these remarks is to be Forestalling.

<sup>1</sup> 24 L. J., Q. B. 353; 6 E. & B. 47.



regrating, and  
engrossing.

found in the radical change of public opinion, and of the law upon the subjects of forestalling, regrating, and engrossing, which were reprobated by the common law as against public policy, and punished as crimes. *Forestalling* was the buying or contracting for any merchandise or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there; or persuading them to enhance the price there. *Regrating* was the buying of corn or any other dead victual in any market and selling it again in the same market, or within four miles of the place. *Engrossing* was the getting into one's possession or buying up large quantities of corn or other dead victuals with intent to sell them again.<sup>1</sup> In *The King v. Waddington*,<sup>2</sup> the defendant was sentenced to a fine of 500*l.* and four months imprisonment (*i.e.* a further term of one month in addition to his previous confinement of three months), for the offence of trying to raise the price of hops in the market by telling sellers that hops were too cheap, and planters that they had not a fair price for their hops; and contracting for one-fifth of the produce of two counties when he had a stock in hand, and did not want to buy, but merely to speculate how he could enhance the price. Lord Kenyon made many observations on the subject of public policy, discussed the doctrine of free trade, referred to his study of Smith's *Wealth of Nations* and other writings on political economy, and declared that the defendant's was "an offence of the greatest magnitude;" that "no defence could be made for such conduct;" that the policy of the common law, which he declared to be still in force on this subject, was "to provide for the wants of the poor labouring classes of the country: and if humanity alone cannot operate to this end, interest and policy must compel our attention to it." The passing of sentence was postponed to the next term, and Grose, J., in delivering the opinion of the Court, said: "It would be a *precedent of most awful moment* for this Court to declare that hops, which are an article of merchandise, and

<sup>1</sup> 4 Black. Com. 158; and Mr. Chitty's note, ed. 1844.      <sup>2</sup> 1 East, 143.

which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article, the price of which it is a crime, by undue means, to enhance."

The common-law rules on the subject of these offences were abolished by the statute 7 & 8 Vict. c. 24, and although no legislation on the subject has taken place in America, Mr. Story says:<sup>1</sup> "These three prohibited acts are not only practised every day, but they are the very life of trade, and without them all wholesale trade and jobbing would be at an end. It is quite safe, therefore, to consider that they would not now be held to be against public policy."

Common law  
rules abolished,  
7 & 8 Vict.  
c. 24.

Notwithstanding these observations, it is quite beyond doubt that there are various well-defined cases where contracts of sale are still held illegal at common law as being violative of public policy and the interests of the state. These are chiefly—1st. Contracts for the sale of offices or the fees or emoluments of office; 2nd. Contracts of sale in restraint of trade; and 3rd. Contracts for the sale of law-suits, or interests in litigation.

Contracts for the sale or transfer of public offices or appointments, or the salary, fees, or emoluments of office, have in many cases been prohibited by statute, as will presently be shown; but by common law antecedent to these enactments such sales were held to be subversive of public policy, as opposed to the interests of the people and to the proper administration of government. *Nulla aliâ re magis Romana respublica interiit, quam quod magistratûs officia venalia erant.* Co. Litt. 234 a. The Courts have reprobated every species of traffic in public office, and of bargains in relation to the profits derived from them. Thus, in *Garforth v. Fearon*,<sup>2</sup> the Common Pleas held, in 1787, that an agreement, whereby the defendant promised to hold a public office in the Customs in trust for the plaintiff, and to permit the plaintiff to appoint the deputies and receive all the emoluments of the place, was illegal and void, Lord Loughborough observing that the effect was to make the plaintiff "the real

Contracts for  
sale of offices.

*Garforth v.*  
*Fearon.*

<sup>1</sup> Story on Sales, p. 647.

<sup>2</sup> 1 Hy. Bl. 327.

officer, but not accountable for the due execution of it; he may enjoy it without being subject to the restraints imposed by law on such officers, for he does not appear as such officer; he may vote at elections, may exercise inconsistent trades, may act as a magistrate in affairs concerning the revenue, may sit in Parliament, and he will be safe if he remains undiscovered. If extortion be committed in the office by those appointed, the profits of that extortion redound to him, but he escapes a prosecution; for not being the acting officer, he does not appear upon the records of the Exchequer, and is not liable to the disabilities imposed by the statute on officers guilty of extortion, who are incapacitated to hold any office relating to the revenue. Whether a trust can be created in such an office is for the consideration of the Court in which the suit was originally brought. The only question in this Court is, whether the agreement springing out of such a transaction can support an action?"

*Parsons v.  
Thompson.*

In *Parsons v. Thompson*,<sup>1</sup> in 1790, the same Court held illegal a bargain by which the plaintiff, a master joiner in his majesty's dockyard at Chatham, agreed to apply for superannuation on condition that the defendant, if successful in obtaining his place, would share the profits with the plaintiff. In this case stress was laid on the fact that the bargain was unknown to the person having the power to appoint.

*Law v. Law.*

In equity, a perpetual injunction was granted against enforcing a bond for the purchase of an office, as opposed to public policy, although the sale was not within the prohibitions of the statutes.<sup>2</sup> And in *Law v. Law*,<sup>3</sup> a bond was held illegal by which a party covenanted to pay 10*l.* per annum, as long as he enjoyed an office in the excise, to a person who by his interest with the commissioners had obtained the office for him.

<sup>1</sup> 1 Hy. Bl. 322. See, also, *Waldo v. Martin*, 4 B. & C. 319, case of a contract relative to an appointment in the Petty Bag Office.

<sup>2</sup> *Harrington v. Du Chastel*, 1 Bro. C. C. 124; *Methwold v. Walbank*, 2 Ves. Sen. 238.

<sup>3</sup> 3 P. Wms. 391.

In *Blackford v. Preston*,<sup>1</sup> the sale by the owner of a ship in the East India Company's service, of the place of master of the vessel, was held illegal, as being in violation of the laws and regulations of the company, and of public policy, and Lord Kenyon said: "There is no rule better established respecting the disposition of every office in which the public are concerned than this, *detur digniori*; on principles of public policy, no money consideration ought to influence the appointment to such offices."

*Blackford v.  
Preston.*

In *Card v. Hope*,<sup>2</sup> the Court went further, and not only affirmed the doctrine of *Blackford v. Preston*, but expressed a strong opinion that the majority of the owners of any ship, whether in public or private service, who had the right to appoint the officers, could not make sale of an appointment, because public policy gives every encouragement to shipping in this country, and the power of appointing the officer without the consent of the minority, carries with it the duty of exercising impartial judgment in regard to the office, *ut detur digniori*.

In *Harrington v. Du Chastel*,<sup>3</sup> Lord Thurlow held illegal a bargain by which an officer in the King's household recommended a person to another office in the household in consideration of an annuity to be paid to a third person.

*Harrington v.  
Du Chastel.*

In *Corporation of Liverpool v. Wright*,<sup>4</sup> the defendant was appointed clerk of the peace by the plaintiffs, under the Municipal Corporations Act, which made the tenure of the office dependent only on good behaviour, and fixed the fees attached to the office. The Municipal Council agreed to appoint, and the defendant to accept, under an arrangement which, in substance, bound the defendant to pay over to the borough fund all his fees in excess of a certain annual amount. On demurrer to a bill, filed to enforce this agreement, Vice-Chancellor Wood held it void, as against public policy, on two grounds: First, because a person accepting an office of trust can make no bargain in respect of such office. Secondly, because where the law assigns fees to an

<sup>1</sup> 8 T. R. 89.

<sup>3</sup> 1 Bro. C. C. 124.

<sup>2</sup> 2 B. & C. 661.

<sup>4</sup> 28 L. J., Ch. 868.

office, it is for the purpose of upholding the dignity and performing properly the duties of that office; and the policy of the law will not permit the officer to bargain away a portion of those fees to the appointer or to anybody else.

*Palmer v. Bate.* In *Palmer v. Bate*,<sup>1</sup> the Court of Common Pleas certified to the Vice-Chancellor that an assignment of the income, emolument, produce, and profits of the office of the Clerk of the Peace for Westminster (after deducting the salary of the deputy for the time being), is not a good or effectual assignment, nor valid in the law.

The pay or half-pay of a military officer is not a legal subject of sale.<sup>2</sup> Nor a pension or annuity to a civil officer, unless exclusively for past services, as was held in *Wells v. Foster*,<sup>3</sup> where Parke, B., explained the principle of the cases as follows: "The correct distinction made in the cases is, that a man may always assign a pension given to him entirely as a compensation for past services, whether granted to him for life, or merely during the pleasure of others. In such a case the assignee acquires a title to it, both in equity and at law, and may recover back any sums received in respect of it by the assignor after the date of the assignment. But where the pension is granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable."

Restraint of trade.  
When vendor is restrained generally, sale is void.

A contract of sale, by the terms of which the vendor is restrained *generally* in the carrying on of his trade, is against public policy, and is void. These cases arise usually where tradesmen or mechanics sell out their business, including the good-will, and where the buyer desires to guard himself against the competition in trade of the person whose business he is purchasing.

*Mitchel v. Reynolds.*

The leading case on this subject is *Mitchel v. Reynolds*,<sup>4</sup>

<sup>1</sup> 2 Br. & B. 670.

*Barwick v. Reade*, 1 Hy. Bl. 627.

<sup>2</sup> *Flarty v. Odum*, 3 T. R. 681;

<sup>3</sup> 8 M. & W. 149.

*Lidderdale v. Montrose*, 4 T. R. 248;

<sup>4</sup> 1 P. Williams, 181.

in the Queen's Bench, in 1711, and republished in Smith's Leading Cases.<sup>1</sup> The action was debt on a bond. The condition recited that defendant had assigned to the plaintiff the lease of a messuage and bakehouse in Liquorpond Street, parish of St. Andrew's, for five years, and the defendant covenanted that he would not exercise the trade of a baker within that parish during the said term under penalty of 50*l*. The defendant pleaded that he was a baker by trade, that he had served an apprenticeship to it, *ratione cujus*, the said bond was void in law, *per quod* he did trade, *prout ei bene licuit*. Demurrer in law. Held, a valid bond. In a very elaborate judgment, Parker, C. J., laid down, as settled rules, that voluntary restraints of trade by agreement of parties were either—First, general, and in such cases, void, whether by bond, covenant, or promise; whether with or without consideration, and whether of the party's own trade or not; or, second, particular, and these latter were either without consideration, in which case they are void, by what sort soever of contract created; or with consideration. In this latter class they are valid, when made upon a good and adequate<sup>2</sup> consideration, so as to make them proper and useful contracts. This doctrine, with same modification, has been maintained in many subsequent cases as the settled rule of law.<sup>3</sup>

In *Homer v. Ashford*,<sup>4</sup> Best, C. J., said: "The law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed therefore by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking *in the kingdom*, would be void. But it may often happen that individual interest and general convenience render engagements not to carry on trade or to act in a profession *in a particular place*, proper.

*Homer v. Ashford.*  
Restraint as to particular place.

In accordance with these principles, covenants have been Examples.

<sup>1</sup> 6th ed., p. 356 of Vol. I.

<sup>2</sup> Overruled as to adequacy of consideration, *post*, p. 394.

<sup>3</sup> *Master, &c., of Gunmakers v. Fell*, Willes, 388; *Cheesman v. Nain-*

*by*, 2 Str. 739, and 1 Bro. P. C. 234; *Gale v. Reed*, 8 East, 83; *Stuart v. Nicholson*, 8 Bing. N. C. 113; *Young v. Timmins*, 1 C. & J. 331.  
<sup>4</sup> 3 Bing. 328.

held legal not to carry on business as a surgeon for fourteen years within ten miles of a particular place;<sup>1</sup> not to practise as attorney within London and 150 miles from thence;<sup>2</sup> not to practise as attorneys or solicitors in *Great Britain* for twenty years, without the consent of the vendee to whom the business was sold;<sup>3</sup> not to carry on trade as a horsehair manufacturer within 200 miles of Birmingham;<sup>4</sup> not to carry on trade as a milk-man for twenty-four months within five miles from Northampton Square;<sup>5</sup> not to supply bread to the customers of a baker's shop, of which the lease and good-will were sold;<sup>6</sup> not to travel for any other commercial firm than that of the employers, within the district for which the traveller was employed;<sup>7</sup> not to run a coach within certain specified hours upon a particular road.<sup>8</sup>

Mode of measuring the space.

Where there is a partial restraint as to *space*, the distance is to be measured from the place designated in a straight line on a horizontal plane,<sup>9</sup> in the absence of any expressions indicating the intention of the parties to adopt a different mode of measurement.<sup>10</sup>

Where restraint general as to *place*, sale void. Examples.

On the other hand, where the restraint was general, as to *place*, the agreements have been held void; as in a covenant not to be employed in the business of a coal merchant for nine months.<sup>11</sup> In this case, Parke, B., said that he could not express the rule more clearly than was done by Tindal, C. J., in *Hitchcock v. Coker* (6 Ad. & E. 456), when he said: "We agree in the general principle adopted by the Court of King's Bench, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can

<sup>1</sup> *Davis v. Mason*, 5 T. R. 118.

<sup>2</sup> *Bunn v. Guy*, 4 East, 190.

<sup>3</sup> *Whittaker v. Howe*, 3 Beav. 383: this was on the ground of limitation of time (*sed quære?*), *post*, p. 394.

<sup>4</sup> *Harms v. Parsons*, 32 L. J., Ch. 247.

<sup>5</sup> *Procter v. Sargent*, 2 M. & G. 20.

<sup>6</sup> *Rennie v. Irvine*, 7 M. & G. 969.

<sup>7</sup> *Mumford v. Gething*, 7 C. B., N. S. 305, and 29 L. J., C. P. 105.

<sup>8</sup> *Leighton v. Wales*, 3 M. & W. 545.

<sup>9</sup> *Duignan v. Walker*, 1 Johns. 446, and 28 L. J., Ch. 867; *Lake v. Butler*, 5 E. & B. 92, and 24 L. J., Q. B. 273; *The Queen v. Saffron Walden*, 9 Q. B. 76, and 15 L. J., M. C. 115; *Jewell v. Stead*, 6 E. & B. 350, and 25 L. J., Q. B. 294.

<sup>10</sup> *Atkins v. Kinnier*, 4 Ex. 776; *Leigh v. Hind*, 9 B. & C. 774.

<sup>11</sup> *Ward v. Byrne*, 5 M. & W. 548.

possibly require, such restraint must be considered unreasonable in law, and the contract which would enforce it must be therefore void."

In *Hinde v. Gray*,<sup>1</sup> a covenant, in a demise by a brewer of his premises and business in Sheffield for ten years, that he would not during the continuance of the demise carry on the business of a brewer, or merchant, or agent, for the sale of ale, beer, or porter, in Sheffield, *or elsewhere*, was held void. But in the later cases, as will presently appear, such stipulations have been held *divisible*; and valid, so far as the particular place was concerned, although illegal as to the general restraint.

*Hinde v. Gray.*  
Not to trade in  
S. or elsewhere  
for 10 years.

The restraint may be general or limited as to *time*, as well as *space*. In *Ward v. Byrne*,<sup>2</sup> the covenant was that "the said Thomas Byrne shall not follow or be employed in the said business of a coal merchant, either directly or indirectly, for the space of nine months after he shall have left the employment of the said W. Ward." There was a verdict for plaintiff, and motion in arrest of judgment, on the ground that the agreement was void in law as against public policy. Parke, B., commenting on the limitation of time, said: "When a *general* restriction, limited only as to *time* is imposed, the public are altogether losers, for that time, of the services of the individual, and do not derive any benefit whatever in return; and looking at the authorities cited upon this subject, it does not appear that there is one clear authority in favour of a *total* restriction in trade, limited only as to *time*." All the judges concurred in this view of the subject.

Restraint as to  
time.  
*Ward v.*  
*Byrne.*

In *Hitchcock v. Coker*,<sup>3</sup> the Exchequer Chamber held, that the restraint might be indefinite as to time, might extend to the whole lifetime of the party, when the restriction was otherwise reasonable—and the judges considered this point as settled law, in *Mumford v. Gething*,<sup>4</sup> Erle, C. J., saying: "I argued most strenuously in *Hitchcock v. Coker*,

*Hitchcock v.*  
*Coker.*

*Mumford v.*  
*Gething.*

<sup>1</sup> 1 M. & G. 195.

<sup>2</sup> 5 M. & W. 548.

<sup>3</sup> 6 Ad. & E. 438.

<sup>4</sup> 29 L. J., C. P. 104, and 7 C. B.,  
N. S. 305. See *Jones v. Lees*, 26 L.  
J., Ex. 9.



that a restriction, indefinite in point of time, avoided the contract, but the court of error decided against me."

Restraint as to  
time unim-  
portant.

It would appear from these cases that the question of time is unimportant in determining whether a contract is void as being in restraint of trade. If the restraint be *general* as to *space*, a limitation as to *time* will not cure the illegality: if *partial* as to *space*, the absence of a limit as to *time* will not taint the contract with illegality. The decision of the Master of the Rolls, therefore, in *Whittaker v. Howe*<sup>1</sup> (*ante*, p. 392), has been practically overruled in the later cases.<sup>2</sup>

Courts will not  
inquire into  
*adequacy* of  
consideration.  
*Mitchel v. Rey-*  
*nolds* overruled  
on this point.

It has already been seen that in the leading case of *Mitchel v. Reynolds*,<sup>3</sup> Parker, C. J., laid down the proposition that to render a particular or partial restraint legal, it was necessary that the contract should be made "upon a good and adequate consideration, so as to make it a proper and useful contract."

*Young v.*  
*Timmins.*

The earlier cases went upon this doctrine, and the Courts took into contemplation the *adequacy* of the consideration for the restraint. In *Young v. Timmins*,<sup>4</sup> Lord Lyndhurst, C. B., and Bayley and Vaughan, BB., held the contract void, on the express ground that the consideration was inadequate, though no doubt the contract was also entirely unreasonable for want of mutuality, as pointed out by Bolland, B., inasmuch as the agreement bound the workman to work for no one but his employers, and left them at liberty to employ him or not at their discretion.

*Wallis v. Day.*

In *Wallis v. Day*,<sup>5</sup> a contract was held valid as being for sufficient consideration, and not in general restraint of trade, where a carrier sold his business under an agreement, by which he entered into the vendee's service for life, at a stipulated weekly payment. Here, there was mutuality, and adequacy of consideration.

*Pilkington v.*  
*Scott.*

But in *Pilkington v. Scott*,<sup>6</sup> in 1846, on a contract of the same nature, Alderson, B., said: "The question in this case simply is whether the rule ought to be made absolute,

<sup>1</sup> 3 Beav. 383.

<sup>2</sup> See remark of Patteson, J., in *Nicholls v. Shelton*, 10 Q. B. at page 353.

<sup>3</sup> 1 P. Williams, 181.

<sup>4</sup> 1 Cr. & J. 331.

<sup>5</sup> 2 M. & W. 273.

<sup>6</sup> 15 M. & W. 657.

on the ground that this is a contract in restraint of trade, and has no adequate consideration to support it. If it be an unreasonable restraint of trade, it is void altogether; but if not it is lawful, the only question being whether there is a consideration to support it, *and the adequacy of the consideration the Court will not inquire into*, but will leave the parties to make the bargain for themselves. Before the case of *Hitchcock v. Coker*,<sup>1</sup> a notion prevailed that the consideration must be adequate to the restraint; that was in truth the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain."

The learned Baron had himself been a member of the Court in Exchequer Chamber, in 1837, which reversed the judgment of the King's Bench, in *Hitchcock v. Coker*, and in that case, Tindal, C. J., delivered the unanimous opinion of the Court of Error. Upon the point now under consideration, the language of the opinion is as follows: "Undoubtedly in most, if not all the decided cases, the judges, in delivering their opinion that the agreement in the particular instance before them was a valid agreement, and the restriction reasonable, have used the expression that such agreement appeared to have been made on an adequate consideration, and seem to have thought that an adequacy of consideration was essential to support a contract in restraint of trade. If by that expression it is intended only that there must be a good and valuable consideration, *such consideration as is essential to support any contract not under seal*, we concur in that opinion. If there is no consideration, or a consideration of no real value, the contract in restraint of trade, which in itself is never favoured in law, must either be a fraud upon the rights of the party restrained, or a mere voluntary contract, a *nudum pactum*, and therefore void. But if by adequacy of consideration more is intended, and that the Court must weigh whether the consideration is equal in value to that which the party gives up or loses by the restraint under which he has placed himself, *we feel ourselves bound to differ from that doctrine*. A duty would

*Hitchcock v.  
Coker.*

<sup>1</sup> 6 Ad. & E. 438.

thereby be imposed on the Court in every particular case, which it has no means whatever to execute."

Archer v.  
Marsh.

This decision was held in *Archer v. Marsh*,<sup>1</sup> to have settled the law on the principle that the parties must act on their own views as to the adequacy of the compensation.

Even if restraint be partial and for good consideration, sale not valid if contract is unreasonable.

But even though the restraint be partial, and founded upon good consideration, the Courts will refuse to enforce the contract if unreasonable,—and this is a question of law for the Court, not of fact for the jury.

Mallan v.  
May.

The whole doctrine on the subject, and the authorities, were reviewed in *Mallan v. May*,<sup>2</sup> where the promise was not to carry on, as principal, assistant or agent, the profession of surgeon-dentist, or any branch thereof; in London, or in any of the towns or places in England or Scotland, where the other parties may have been practising, &c., &c.

The principles of law were declared by Parke, B., who gave the opinion of the Court, after time for consideration, to be as follows:—

"If there be simply a stipulation, though in an instrument under seal, that a trade or profession shall not be carried on in a particular place, without any recital in the deed, and without any averment showing *circumstances which rendered such a contract reasonable*, the instrument is void.

"But if there are circumstances recited in the instrument (or probably if they appear by averment), *it is for the Court to determine whether the contract be a fair and reasonable one or not*. And the test appears to be whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided. Contracts for the partial restraint of trade are upheld, not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with

<sup>1</sup> 6 Ad. & E. 968. See, also, *Sainter v. Ferguson*, 7 C. B. 716, and *Hartly v. Cummings*, 5 C. B. 247.      <sup>2</sup> 13 M. & W. 511, and 11 M. & W. 653.

public convenience and the general interest, and have been supported. Such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a good-will, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry." The learned Baron discussed the question whether the limits assigned by the covenant before the Court were reasonable, and adopted as safe law the proposition of Tindal, C. J., in *Horner v. Graves*,<sup>1</sup> that "*whatever restraint is larger than the necessary protection of the party with whom the contract is made is unreasonable and void.*" Applying this rule, the Court then held that for such a profession as that of a dentist, the limit of London was not too large: that the further restraint was unreasonable, and that the contract was not illegal as a whole, because illegal in part; that the stipulation as to not practising in London<sup>2</sup> was valid, and was not affected by the illegality of the other part.<sup>3</sup>

Restraint larger than necessary for protection of vendee renders contract void as to excess.

This decision was followed in *Green v. Price*,<sup>3</sup> where an agreement not to carry on business as perfumers within the cities of London and Westminster, or the distance of 600 miles from the same respectively, was held valid as to London and Westminster, but void as to the 600 miles; and this was affirmed in *Cam. Scacc.*<sup>4</sup>

*Green v. Price.*

It has also been held that where the contract is reasonable at the time when it is made, subsequent change of circumstances will not affect its validity.<sup>5</sup>

Contract valid if good when made.

Contracts for the sale of lawsuits or interests in litigation are, in certain cases, also void at common law, as being against public policy.

Sales of lawsuits.

*Champerty* is a contract for the purchase of another's

*Champerty and maintenance.*

<sup>1</sup> 7 Bing. 743.

<sup>2</sup> The Court held that "London" meant the city of London, and did not include Great Russell Street, Middlesex: 13 M. & W. 517.

<sup>3</sup> 13 M. & W. 699.

<sup>4</sup> 16 M. & W. 846. See, also, *Nicholls v. Stretton*, 10 Q. B. 846, and *Tallis v. Tallis*, 1 E. & B. 391, 22 L. J., Q. B. 185.

<sup>5</sup> *Elves v. Crofts*, 10 C. B. 241; *Jones v. Lees*, 1 H. & N. 189.

suit or right of action; or a bargain by which a person agrees to carry on a suit at his own expense for the recovery of another's property on condition of dividing the proceeds. This, as well as *maintenance*, are offences at common law, and cannot, therefore, form the subject of a valid contract. Maintenance, according to Lord Coke,<sup>1</sup> "is derived of the verb *manutenere*, and signifieth in law a taking in hand, bearing up or upholding of quarrels and sides, to the disturbance or hindrance of common right."

Stanley v.  
Jones.

In *Stanley v. Jones*,<sup>2</sup> an agreement by a man who had evidence in his possession respecting a matter in dispute between third persons, and who professed to be able to procure more, to purchase from one of the contending parties, at the price of this evidence, a share of the money to be recovered by it, was held to be champertous; and champerty was defined to be the unlawful *maintenance* of a suit, in consideration of some bargain to have part of the thing in dispute or some profit out of it. "The object of the law was not so much to prevent the purchase or assignment of a matter then in litigation, as the purchase or assignment of a matter in litigation for the purpose of maintaining the action." And the Court held that, in this restricted sense, the offence of champerty remains the same as formerly.<sup>3</sup>

Taking an interest in litigation as a security not champertous.

Taking a transfer of an interest in litigation as a security is not champertous, and is a valid contract.<sup>4</sup>

<sup>1</sup> Co. Lit. 368 b.; 4 Black. Com. 135.

<sup>2</sup> 7 Bing. 369; and see *Sprye v. Porter*, 7 E. & B. 58; 26 L. J., Q. B. 64.

<sup>3</sup> See further as to maintenance and champerty, *Re Masters*, 4 Dow. 18; *Findon v. Parker*, 11 M. & W. 675; *Simpson v. Lamb*, 7 E. & B. 84, and 26 L. J., Q. B. 121; *Flight v. Leman*, 4 Q. B. 883; *Cook v. Field*, 15 Q. B. 460; *Bell v. Smith*, 5 B. & C. 188; *Williamson v. Henley*, 6 Bing.

299; *Pechell v. Watson*, 8 M. & W. 691; *Shackell v. Rosier*, 2 Bing. N. C. 634; *Williams v. Protheroe*, 3 Y. & J. 129, in *Cam. Scacc.*; S. C. 5 Bing. 309; *Earle v. Hopwood*, 9 C. B., N. S. 566; 30 L. J., C. P. 217; *Pince v. Beattie*, 32 L. J., Ch. 734; *Prosser v. Edmonds*, 1 Y. & C. 481; *Knight v. Bowyer*, 27 L. J., Ch. 521; *Bainbridge v. Moss*, 3 Jur. N. S. 58.

<sup>4</sup> *Anderson v. Radcliffe*, E. B. & E. 806—819; 28 L. J., Q. B. 32; in error, 29 L. J., Q. B. 128.

## SECTION II.—CONTRACTS ILLEGAL BY STATUTE.

When contracts are prohibited by statute, the prohibition is sometimes express, and at others implied. Wherever the law imposes a penalty for making a contract, it impliedly forbids parties from making such a contract, and when a contract is prohibited, whether expressly or by implication, it is illegal, and cannot be enforced. Of this there is no doubt.<sup>1</sup>

Prohibition express or implied.  
Implied whenever penalty is imposed.

But the question frequently arises whether, on the true construction of a statute, the contract under consideration has really been prohibited, and in determining this point much weight has been attributed to a distinction held to exist between two classes of statutes, those passed merely for revenue purposes, and those which have in contemplation, wholly or in part, the protection of the public, or the promotion of some object of public policy. It is necessary to review the cases, as the principles established by them seem to be imperfectly stated in some of the text-books.

Distinction between statutes passed for revenue purposes and others.

The leading case on this point is *Johnson v. Hudson*,<sup>2</sup> decided by the King's Bench in 1809. Different statutes had provided, 1st, that all persons dealing in tobacco should, before dealing therein, take out a licence under penalty of 50*l.* : and 2ndly, that no tobacco should be imported, either wholly or in part manufactured, under penalty of forfeiture of the tobacco, the package, and the ship. In this state of the law, the plaintiffs, who had never before dealt in that article, received a consignment of tobacco manufactured into segars, *which they duly entered at the Custom House, and then sold to defendant without taking out a licence.* The Court *held* that the action was maintainable, observing “that here there was no fraud upon the revenue on which ground the smuggling cases had been decided; *nor any clause making the contract of sale illegal*, but at most, it was *the breach of a mere revenue regulation* which was protected

*Johnson v. Hudson.*

<sup>1</sup> *Bensley v. Bignold*, 5 B. & Ald. 887; *Cope v. Rowlands*, 2 M. & W. 149. 335; *Forster v. Taylor*, 5 B. & Ad.

<sup>2</sup> 11 East, 180.

by a specific penalty; and they also doubted whether this plaintiff could be said to be a dealer in tobacco within the meaning of the Act."

Brown v.  
Duncan.

Next, in 1829, *Brown v. Duncan*<sup>1</sup> came before the same Court. The statutes provided, 1st, that no distiller should, under penalty, deal in the retail sale of spirits within two miles of the distillery; and 2nd, that in taking out a licence for distilling, the names of the persons taking out the licence should be inserted. One of five partners in a distillery was engaged in the retail trade within two miles of the distillery, and his name was, it seems, intentionally omitted in taking out the distillers' licence. The partners then appointed an agent to sell their whisky in London, and the defendant guaranteed the fidelity of the agent. In the action by the partners to enforce this contract, its illegality was pleaded. The Court held that the plaintiffs could recover on the authority of *Johnson v. Hudson*, saying "there has been no fraud on the part of the plaintiffs on the revenue, although they have not complied with the regulations which it has been thought wise to adopt in order to secure, as far as may be, the conducting of the trade in such a way as is deemed most expedient for the benefit of the revenue. \* \* These cases are very different from those where the provisions of Acts of Parliament have had for their *object the protection of the public*, such as the Acts against stock-jobbing and the Acts against usury. It is different, also, from the case where a sale of bricks required by Act of Parliament to be of a certain size was held to be void because they were under that size. There the Act of Parliament operated as a *protection to the public as well as to the revenue*, securing to them bricks of particular dimensions. Here the clauses of the Act of Parliament had *not for their object to protect the public, but the revenue only*."

Cope v. Row-  
lands.

In 1836, *Cope v. Rowlands*<sup>2</sup> was decided in the Exchequer, and it was held that a City of London broker could

<sup>1</sup> 10 B. & C. 93. See, also, *Wetherell v. Jones*, 3 B. & Ad. 221.

<sup>2</sup> 2 M. & W. 149; and see *Fergus-*

*son v. Norman*, 5 Bing. N. C. 76, approving *Cope v. Rowlands*.

not maintain an action for his commissions in buying and selling stock, unless duly licensed according to the 6 Anne, c. 16, s. 4, which provides that if any person should act as a broker in making sales, &c., without such licence, he shall forfeit 25*l.* "for every such offence." In the course of the argument, Parke, B., said: "Very considerable doubt was thrown on the distinction which has been taken between breaches of laws passed for revenue purposes, and others, in the case of *Brown v. Duncan*, and when it comes to be considered, I think that distinction will be overruled." The Court took the case under consideration, and the decision was delivered by the same learned Baron, who again said: "It may be safely laid down, notwithstanding some dicta apparently to the contrary, that if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute *means to prohibit the contract*." Notwithstanding this statement, the learned Baron went on to say that the question before the Court was whether the statute under discussion "is meant *merely* to secure a revenue to the city, \* \* \* or whether *one* of the *objects* be the *protection of the public*. \* \* \* *On the former supposition, the contract with a broker for his brokerage is not prohibited by the statute; in the latter it is.*" The Court then decided that the benefit and security of the public formed *one* object of the statute, and that the plaintiffs were not entitled to recover.

Again, in 1845, the same point was discussed in the same Court, in *Smith v. Mawhood*,<sup>1</sup> where the defence in an action for goods sold and delivered was based on the allegation that the goods were tobacco, and that the plaintiff had not complied with the law requiring him to have his name painted on the house in which he carried on his business, in the manner specified in the law, under penalty that the person so offending should forfeit 200*l.* Held, that plaintiff

*Smith v. Mawhood.*

<sup>1</sup> 14 M. & W. 463.



could maintain his action. Parke, B., said: "I think the object of the legislature was not to *prohibit a contract* of sale by dealers who have not taken out a licence pursuant to the Act of Parliament. If it was, they certainly could not recover, although the prohibition were *merely* for the purpose of revenue. But, looking to the Act of Parliament, I think its object was not to vitiate the contract itself, but only to *impose a penalty on the party offending for the purpose of the revenue.*" The other judges concurred, and Alderson, B., pointed out, as a controlling circumstance in construing the statute, that the penalty was "for carrying on the trade in a house in which the requisites were not complied with; and that there is no addition to his criminality if he makes fifty sales of tobacco in such a house."

This distinction seems to be as sound as it is acute. In *Cope v. Rowland*, the broker was not allowed to recover, because, by the law, *each sale was an offence, punished by a separate penalty*; but in *Smith v. Mawhood* there was but one offence, punished by but one penalty, viz., the *offence of failing to paint a proper sign on the house in which the business was done*. Making a sale in such a house was not declared by the law to be an offence.

Cundell v.  
Dawson.

In the Court of Common Pleas, in 1847, all the foregoing cases were cited and considered in *Cundell v. Dawson*.<sup>1</sup> At the close of the argument, Wilde, C. J., said that considering the diversity of *dicta* and decisions on the subject, the Court would not pronounce any judgment without looking into the cases more carefully, and the matter was therefore held under advisement from the 23rd April to 8th May, when the Chief Justice delivered the opinion of the Court. The action was for the price of coals, and the defence was that the plaintiff had violated the statute 1 & 2 Vict. c. 101, by failing to deliver to the defendant a ticket as required by that statute, stating the quantity and description of the coals delivered. The statute directed such delivery, under penalty, in case of default, of 20*l.* "for

<sup>1</sup> 4 Com. B. 376.

every such offence." The Chief Justice said: "The statutes which have given rise to the question of the right to recover the price of goods by sellers who have not complied with the terms of such statutes, are of two classes,—the one class of statutes having for their *object the raising and protection of the revenue*: the other class of statutes being directed either to the *protection of buyers* and consumers, or to some *object of public policy*. The present case arises upon a statute included in the latter class. \* \* \* The class of statutes enacted simply for the security of the revenue, do not apply to the present case; and various determinations which are contained in the books, upon the construction of those statutes, and the effect of a non-compliance with their enactments by the seller of goods, rest upon principles not applicable to the present case." The Court then held, on the authority of *Little v. Pool*,<sup>1</sup> that the Coal Acts<sup>2</sup> were intended to prevent fraud in the delivery of coals; to protect the buyer; and judgment was therefore given for the defendant.

In 1848, the same Court adverted to the same distinction in *Ritchie v. Smith*.<sup>3</sup> The case was a very clear one. It was a bargain between parties, by which the buyer was to be enabled to carry on a retail trade in spirits on part of the vendor's premises, under the vendor's licence, so as to make one licence cover both trades. The statute 9 Geo. IV. c. 61, inflicted a penalty, when liquor was sold to be drunk on the premises, without such licence, of not more than 20*l.* nor less than 5*l.*, "for every such offence." Wilde, C. J., said that "it is impossible to look at this agreement without seeing that the parties contemplated doing an illegal thing, in the infraction of a law enacted *not simply for revenue purposes*, but for the safety and protection of the public morals." All the judges, Coltman, Maule, and Williams, put the judgment on the same ground, that the law was made *not merely*

*Ritchie v. Smith.*

<sup>1</sup> 9 B. & C. 192.

<sup>2</sup> The Coal Act, 1 & 2 Vict. c. 101, does not apply where coals are unloaded directly from the vessel in which they were shipped on to the

wharf of the purchaser. *Blanford v. Morrison*, 15 Q. B. 724, and 19 L. J., Q. B. 583.

<sup>3</sup> 6 C. B. 462.

*for revenue purposes, but for the protection of the public morals."*<sup>1</sup>

General rules on the distinction between the two classes of statutes.

The propositions that seem fairly deducible from the foregoing authorities are the following :—

*First.*—That where a *contract* is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only, or for any other object. It is enough that parliament has prohibited it, and it is therefore void.

*Secondly.*—That when the question is *whether* a contract has been prohibited by statute, it is material, in *construing the statute*, to ascertain whether the legislature had in view *solely* the *security and collection of the revenue*, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is, that the statute was not intended to prohibit contracts ; in the latter, that it was.

*Thirdly.*—That in seeking for the meaning of the law giver, it is material also to inquire whether the penalty is imposed once for all, on the offence of failing to comply with the requirements of the statute, or whether it is a recurring penalty, repeated as often as the offending party may have dealings. In the latter case, the statute is intended to *prevent the dealing*, to *prohibit the contract*, and the contract is therefore void ; but in the former case such is not the intention, and the contract will be enforced.

Acts relative to printers.  
*Bensley v. Bignold.*

It is quite in accordance with these principles that in *Bensley v. Bignold*,<sup>2</sup> it was held by the Common Pleas that a printer who had omitted to affix his name to a book, in violation of 39 Geo. III. c. 79, s. 27, which punishes such omission by a penalty of 20*l.* *for every copy published*, could not recover for work and labour done, and materials furnished. The statute was declared to have been enacted for public purposes.

<sup>1</sup> It is not a fraud on the revenue, nor illegal, to sell to an unlicensed person beer which is to be retailed by

a licensed person at a public-house.  
*Brooker v. Wood*, 5 B. & Ad. 1032.  
<sup>2</sup> 5 B. & Ald. 335.

So, also, in *Forster v. Taylor*,<sup>1</sup> a farmer was held not entitled to recover the price of butter sold, because he had packed it in firkins not marked, in violation of the prohibition of the statute, 36 Geo. III. c. 88; and in *Law v. Hodson*,<sup>2</sup> a vendor failed in his action because his bricks had been sold of smaller dimensions than permitted by the statute 17 Geo. III. c. 42. In both these statutes a penalty was imposed *for every offence*.

Act relative to sales of butter.  
*Forster v. Taylor*.

Act relative to the sale of bricks.  
*Law v. Hodson*.

In *Lightfoot v. Tenant*,<sup>3</sup> the sale was of lawful goods, but they were sold knowingly for the purpose of being shipped on board of foreign ships trading to the East Indies, and by the 7 Geo. I. c. 21, s. 2, all contracts for loading or supplying such ships with cargo were declared void. The plaintiff was held not entitled to recover.

East India trade Acts.  
*Lightfoot v. Tenant*.

There have been numerous decisions, also, under the various statutes which have been passed, modified, and repealed from time to time, for ascertaining and establishing uniformity of weights and measures, all of which are quite in accordance with those above reviewed.<sup>4</sup>

Weights and Measures Acts.

The statute 1 & 2 Will. IV. c. 82, prohibits the sale of birds of game after the expiration of ten days from the respective days in each year on which it becomes unlawful under the Act to kill or take such birds. This Act includes live game.<sup>5</sup> The 17th section authorises every person who shall have obtained a game certificate, to sell game to a licensed dealer, with a proviso that no gamekeeper shall sell any game, except for account and on the written authority of his master, whenever his game certificate has cost less than 3*l.* 13*s.* 6*d.*

Game laws.

The 25th section prohibits, under penalty of not more than 2*l.* for each head of game, the offence of selling game

<sup>1</sup> 5 B. & Ad. 887.

<sup>2</sup> 11 East, 300; and see a case on the game laws, *Helps v. Glenister*, 8 B. & C. 553.

<sup>3</sup> 1 B. & P. 551.

<sup>4</sup> See *Rex v. Major*, 4 T. R. 750; *Rex v. Arnold*, 5 T. R. 353; *Tyson v. Thomas*, 1 M'Cl. & Y. 119; *Owens v. Denton*, 1 C. M. & R. 711; *Hughes*

*v. Humphreys*, 23 L. J., Q. B. 356, and 3 E. & B. 954; *Jones v. Giles*, 23 L. J., Ex. 292, and 10 Ex. 119; and in *Cam. Scacc.* 24 L. J., Ex. 259, and 11 Ex. 303; *Watts v. Friend*, 10 B. & C. 446.

<sup>5</sup> *Loomes v. Bayly*, 30 L. J., M. C. 31; but see, also, *Porritt v. Baker*, 10 Exch. 759.

by an unlicensed person, who has not obtained a game certificate, or of selling, even when possessed of a game certificate, to any other person than a licensed dealer; but by the 26th section, the prohibition does not extend to an inn-keeper or tavern keeper who sells to his guests, for consumption in his house, game bought from a licensed dealer. The 27th section imposes penalties on the buyer of game who buys from one not a licensed dealer, unless the purchase be made *bond fide* at a shop or house where a board is affixed to the front, purporting to be the board of a licensed dealer in game.

**Tippling Acts.** By the statute 24 Geo. II. c. 40, s. 12 (usually termed the Tippling Act), as amended by the 25 & 26 Vict. c. 38, no person shall be entitled to recover the price of spirituous liquors, unless sold at one time *bond fide*, to the amount of 20s. or upwards, except in cases when sold to be consumed elsewhere than at the place of sale, and delivered at the residence of the purchaser, in quantities not less at one time than a reputed quart.

Act 30 & 31  
Vict. c. 142,  
s. 4.

And now by 30 & 31 Vict. c. 142, s. 4, "No action shall henceforth be brought or be maintainable in any court to recover any debt or sum of money, alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry, consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given" for obtaining said articles.

**Decisions under  
Tippling Acts.**

In construing the Tippling Acts it has been held, that the prohibition extends to sales made to a retail dealer who bought for the purpose of selling again to his customers;<sup>1</sup> but in *Spencer v. Smith*,<sup>2</sup> Lord Ellenborough would not allow this defence to prevail, where a bill of exchange for 6*l.* had been given by a lieutenant in the recruiting service for spirits supplied to him at different times, not for consumption at the house of vendor, but for use by recruits and others under the officer's command. In *Burnyeat v. Hutchinson*,<sup>3</sup> the Queen's Bench, in 1821, refused to except

<sup>1</sup> *Hughes v. Dove*, 1 Q. B. 294, over-  
ruling *Jackson v. Attrill*, Peake, 181.

<sup>2</sup> 3 Camp. 9.

<sup>3</sup> 5 B. & Ald. 241.

from the operation of the statute a sale made to one who was not himself the consumer, and where the spirits formed part of an entertainment given at the buyer's expense to third persons, the Court holding that the "prohibition was general and absolute." This decision was not brought to the notice of Lord Abinger, in 1835, when he held, in *Proctor v. Nicholson*,<sup>1</sup> that the enactment did not apply to the case of spirits supplied to a guest lodging in the house, and *Proctor v. Nicholson* can hardly be considered an authority after the observations of the Court in *Hughes v. Dove*.<sup>2</sup>

If quantities of spirits of different kinds be sold, the quantity of each being less than 20s. in value, but the whole amounting to more than that sum, the sale is legal.<sup>3</sup>

Some cases<sup>4</sup> in which the price of spirits sold in contravention of the Tippling Acts formed only part of the consideration of the contract sued on, are cited in the note. See, also, *ante*, p. 309, as to consideration partly illegal.

By the 31 Geo. II. c. 40, s. 11, cattle salesmen in London, and others who sell cattle there on commission, are forbidden to buy live cattle, sheep, or swine, either in London or while on the road to London (except for actual use by themselves and family), or to sell in London or within the weekly bills of mortality, any live cattle, sheep, or swine. This statute is said in the preamble to be intended to prevent abuses by cattle salesmen to the prejudice of their employers.

Cattle salesmen  
in London.

The statutes passed in relation to the sale of offices are the 5 & 6 Edw. VI. c. 16, and the 49 Geo. III. c. 126, amending and enlarging the provisions of the first Act. These statutes are declared to extend to Scotland and Ireland by the first section of the latter Act.

Sales of office.  
Acts 5 & 6  
Edw. 6, c. 16; 49  
Geo. 3, c. 126.

The principal provisions of these statutes prohibit the sale of any office, or deputation, or part of an office which "shall in any wise touch or concern the administration or

<sup>1</sup> 7 Car. & P. 67.

<sup>2</sup> 1 Q. B. 294.

<sup>3</sup> *Owens v. Porter*, 4 C. & P. 367.

<sup>4</sup> *Scott v. Gillmore*, 3 Taunt. 226;

*Crookshank v. Rose*, 5 Car. & P. 19;

*Philpott v. Jones*, 2 Ad. & E. 41;

*Gaitskill v. Greathead*, 1 Dow. & Ry.

359; *Dawson v. Remnant*, 6 Esp. 24.

execution of justice, or the receipt, controlment, or payment of any of the king's highness' treasure, money, rent, revenue, account, aulnage, auditorship, or surveying of any of the king's Majesty's honours, castles, manors, lands, tenements, woods, or hereditaments; or any of the king's Majesty's customs, or any other administration or necessary attendance to be had; done, or executed in any of the king's Majesty's custom-house or houses; or the keeping of any of the king's Majesty's towns, castles, or fortresses being used, occupied, or appointed for a place of strength and defence; or which shall touch or concern any clerkship to be occupied in any manner of court of record, wherein justice is to be ministered" (5 & 6 Edw. VI. c. 16, s. 2); and "all offices in the gift of the crown or of any office appointed by the crown, and all commissions civil, naval, or military, and all places and employments, and all deputations to any such offices, commissions, places, or employments in the respective departments or offices, or under the appointment or superintendence and control of the Lord High Treasurer, or Commissioners of the Treasury, the Secretary of State, the Lords Commissioners for executing the office of Lord High Admiral, the Master-General, and principal officers of his Majesty's Ordinance, the Commander-in-Chief, the Secretary of War, the Paymaster-General of his Majesty's Forces, the Commissioners for the affairs of India, the Commissioners of Excise, the Treasurer of the Navy, the Commissioners of the Navy, the Commissioners for Victualling, the Commissioners of Transports, the Commissary-General, the Storekeeper-General, and also the principal officers of any other public department or office of his Majesty's Government in any part of the United Kingdom, or in any of his Majesty's dominions, colonies, or plantations which now belong, or may hereafter belong to his Majesty, and also to all offices, commissions, places and employments belonging to or under the appointment or control of the United Company of Merchants of England trading to the East Indies." (49 Geo. III. c. 126, s. 1).

Exceptions to

The exceptions to these prohibitions provide that they

shall not be applicable "to any office or offices whereof any person or persons is or shall be seized of any estate of inheritance; nor to any office of parkership or the keeping of any park, house, manor, garden, chase, or forest, or to any of them."<sup>1</sup> And it is provided that the Act "shall not in any wise extend or be prejudicial or hurtful to any of the chief justices of the king's courts, commonly called the King's Bench or Common Pleas, or to any of the justices of assize, that now be or hereafter shall be, but that they and every of them may do in every behalf touching or concerning any office or offices to be given or granted by them or any of them, as they or any of them might have done before the making of this Act."<sup>2</sup>

the prohibi-  
tion.

It is also provided that "nothing in this Act contained shall extend or be construed to extend to any purchases, sales, or exchanges of any commissions or appointments in the honourable band of gentlemen pensioners, or in his Majesty's yeoman guard, or in the Marshalsea, and the court of the king of the palace of the king at Westminster, or to extend to any purchases, sales, or exchanges of any commission in his Majesty's forces, for such prices as shall be regulated and fixed by any regulation made or to be made by his Majesty in that behalf."<sup>3</sup>

Further excep-  
tions.

Another section<sup>4</sup> excludes from the operation of the Act of 49 Geo. III. "any office which was legally saleable before the passing of this Act, and in the gift of any person by virtue of any office of which such person is or shall be possessed, under any patent or appointment for his life."

The Act, also, shall not "extend or be construed to extend to prevent or make void any deputation to any office in which it is lawful to appoint a deputy, or any agreement, contract, bond, or assurance lawfully made in respect of any allowance, salary, or payment, made or agreed to be made by or to such principal or deputy respectively out of the fees or profits of such office;" (49 Geo. III. c. 126, s. 10;) nor "to any annual reservation, charge, or payment made or

<sup>1</sup> Stat. 5 & 6 Edw. VI. c. 16, s. 4.

<sup>3</sup> 49 Geo. III. c. 126, s. 7.

<sup>2</sup> *Ibid.* s. 7.

<sup>4</sup> *Ibid.* s. 9.



required to be made out of the fees, perquisites, or profits of any office to any person who shall have held such office in any commission or appointment of any person succeeding to such office, or to any agreement, contract, bond, or other assurance made for securing such reservation, charge, or payment; provided always, that the amount of such reservation, charge, or payment, and the circumstances and reasons under which the same shall have been permitted, shall be stated in the commission, patent, warrant, or instrument of appointment of the person so succeeding to and holding such office and paying or securing such money as aforesaid." (*Ib.*, s. 11).

Contract that  
A. shall resign  
with intent that  
B. shall get the  
office, void.  
Sir Arthur In-  
gram's case.

On these statutes, it has been held that a contract by A. to resign an office, with the intent of B.'s obtaining the appointment, was void.

In Sir Arthur Ingram's case,<sup>1</sup> the report in Coke is as follows:—"Sir Robert Vernon, Knight, being coferer<sup>2</sup> of the king's house of the king's gift, and having the receipt of a great summe of money yearly of the king's revenue, did for a certaine summe of money bargain and sell the same to Sir A. I., and agreed to surrender the said office to the king to the entent a grant might be made to Sir A., who surrendered it accordingly: and thereupon Sir A. was, by the king's appointment, admitted and sworne coferer. And it was resolved by Sir Thomas Egerton, Lord Chancellour, the Chiefe Justice, and others to whom the king referred the same, that the said office was void by the said statute (5 & 6 Edw. VI. c. 16), and that Sir A. was disabled to have or to take the said office."

Godolphin v.  
Tudor.  
Deputation of  
an office for  
price "out of  
the profits."

It was also held, in the case of Godolphin v. Tudor,<sup>3</sup> in the Queen's Bench, and affirmed in Dom. Proc.,<sup>4</sup> that where the salary of an office within the statute 5 & 6 Edw. VI. was certain, a deputation by the principal, reserving to himself a certain lesser sum out of the salary, is

<sup>1</sup> Co. Lit. 234 a. See, also, Hug-  
gins v. Bainbridge, Willes, 241.

<sup>2</sup> 2 Salk. 467, and 6 Mod. 234;  
also Willes, p. 575, n.

<sup>3</sup> Coferer, or treasurer, from  
"coffer."

<sup>4</sup> 1 Bro. P. C. 185.

good. And even where the profits arising from fees are uncertain, a deputation by the principal, with a reservation of a certain sum, *out of the profits*, is good, for the deputy will not be obliged to pay anything beyond the amount of the profits received. But if the reservation is to pay absolutely a certain sum, without reference to the profits, the agreement is void.<sup>1</sup> And the case was not affected by the fact that it appeared on the record that the payment was to be 200*l.* a-year, and that the profits of the office had amounted to 329*l.* 10*s.* a-year. See the comments of Lord Loughborough in *Garforth v. Fearon* in 1 H. Bl. 327. See, also, the cases of *Juxton v. Morris*, and *Law v. Law*, as reported in the same opinion of Lord Loughborough.

The principles established in these decisions under the 5 & 6 Edw. VI. were held by the Queen's Bench, in *Greville v. Atkins*,<sup>2</sup> to be applicable also to the enactments in 49 Geo. III. c. 126.

Decisions applicable to the later statute.

In the case of *Aston v. Gwinnell*,<sup>3</sup> in Cam. Scacc. in Equity, the statute was held not to apply to a covenant in a deed by which the grantor, a clerk to the Deputy Registrar in the Prerogative Court of Canterbury, authorised and permitted his deputy to pay a yearly sum to trustees of an annuity constituted by the deed. The Court also held that the agreement was not void as against public policy, because the situation held by the grantor was not an office, Sir William Alexander, Lord Chief Baron, saying that "he was a mere clerk, assisting the Deputy Registrars, receiving emoluments for business done at the pleasure of his superiors."<sup>4</sup>

*Aston v. Gwinnell.*

In *Hopkins v. Prescott*,<sup>5</sup> an agreement for the sale of a law-stationer's business, he being also *sub-distributor of stamps*, and *collector of assessed taxes*, coupled with a stipulation that the vendor should not do business as a law-stationer within ten miles, *nor collect any of the assessed taxes*, but would do his best to introduce the purchaser to

*Hopkins v. Prescott.*

<sup>1</sup> See, also, *Culliford v. De Cardenell*, 2 Salk. 466.

<sup>2</sup> 9 B & C. 462.

<sup>3</sup> 3 Y. & J. 136.

<sup>4</sup> But see *Palmer v. Bate*, 2 Br. & B. 673, *ante*, p. 390.

<sup>5</sup> 4 C. B. 578.

the said business *and offices*, was held void under these statutes.

What offices  
are within the  
statute.

In *Harrison v. Klopprogge*,<sup>1</sup> it was held, that the office of private secretary, was not within the statutes. The following officers have been held to come within its provisions : officers of Spiritual Courts, as chancellor, registrar, and commissary,<sup>2</sup> clerk of the fines to a justice in Wales,<sup>3</sup> surrogate,<sup>4</sup> gaolers,<sup>5</sup> undersheriffs,<sup>6</sup> stewards of court-leets,<sup>7</sup> but not the bailiff of a hundred,<sup>8</sup> or the under-marshal of the City of London.<sup>9</sup>

Cadetships in  
East India  
service.

In a case under the 49 Geo. III., it was held, that a cadetship in the East India service was embraced within the law, and that receiving money for procuring the appointment was an indictable offence.<sup>10</sup>

Paying money  
to the officer of  
a regiment to  
induce his re-  
tirement.

In *Graeme v. Wroughton*,<sup>11</sup> a bargain, by which the officers of a regiment subscribed a sum to induce the major to retire, and thus create a step for promotion in the regiment, was held to be a sale of his office by the major, and void under the statute.

Goods delivered  
without permit.

By the 2 Will. IV. c. 16, s. 7, the buyer may resist payment of the price of goods, for the removal of which a permit is required by that statute, by pleading and proving that the goods were delivered without a permit.<sup>12</sup>

Sales on Sunday  
not void at  
common law.

At common law, a sale made on Sunday was not void. In *Drury v. Defontaine*,<sup>13</sup> Sir James Mansfield delivered the judgment of the Common Pleas, that such a sale was not illegal, until made so by statute.

<sup>1</sup> 2 Bro. & B. 678.

<sup>2</sup> *Dr. Tudor's case*, Cro. Jac. 269 ;  
*Robotham v. Tudor*, 2 Brownl. 11.

<sup>3</sup> *Walter v. Walter*, Golds. 180.

<sup>4</sup> *Juxton v. Morris*, 2 Ch. Ca. 42,  
corrected rep. in 1 H. Bl. 332 ;  
*Woodward v. Foxe*, 3 Lev. 289 ;  
*Layng v. Paine*, Willes, 571.

<sup>5</sup> *Stockwith v. North*, Moore, 781 ;  
*Huggins v. Bainbridge*, Willes, 241.

<sup>6</sup> *Browning v. Halford*, Free. 19 ;  
and see stat. 3 Geo. I. c. 15.

<sup>7</sup> *Williamson v. Barnsley*, 1 Brownl.

70.

<sup>8</sup> *Godbold's case*, 4 Leon. 33.

<sup>9</sup> *Ex parte Bulter*, 1 Atk. 210.

<sup>10</sup> *Rex v. Charretier*, 13 Q. B. 447,  
and 18 L. J., M. C. 100.

<sup>11</sup> 11 Ex. 146, and 24 L. J., Ex.  
265.

<sup>12</sup> See a decision on the construc-  
tion of this statute, *Nicholson v.*  
*Hood*, 9 M. & W. 365.

<sup>13</sup> 1 Taunt. 131.

By the 29 Charles II. c. 7, it is enacted that "no trades- 29 Car. 2, c. 7.  
man, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof (works of necessity and charity only excepted), and that every person being of the age of fourteen years or upwards, offending in the premises, shall for every such offence forfeit the sum of five shillings; and that no person or persons whatsoever shall publicly cry, show forth, or expose to sale any wares, merchandises, fruit, herbs, goods or chattels whatsoever upon the Lord's Day, or any part thereof, upon pain that every person so offending shall forfeit the same goods so cried, or showed forth, or exposed to sale."

The first reported case under this statute seems to have been *Drury v. Defontaine*,<sup>1</sup> in 1808, more than 130 years after its passage. There the private sale of a horse on a Sunday, made by a horse-auctioneer, was held valid, as not within the ordinary calling of the vendor, his business being to sell at public, not private sale.

Decisions under  
this statute.  
*Drury v. De-  
fontaine.*

Next, in 1824, in *Bloxsome v. Williams*,<sup>2</sup> Bayley, J., expressed his entire concurrence in the above decision of the Common Pleas, but decided the case on two grounds: 1st, that in the case before him the sale was not complete on the Sunday; and, 2ndly, that it was not competent for the defendant, the guilty party, who was violating the statute by exercising his own ordinary calling of a horse dealer on Sunday, to set up his own contravention of the law against the plaintiff, an innocent person, *who was ignorant of the fact that the defendant was a horse dealer*. Holroyd and Littledale, JJ., concurred.

*Bloxsome v.  
Williams.*

In 1826, *Fennell v. Ridler*,<sup>3</sup> was decided by the same judges. Plaintiffs were horse dealers, who bought a horse, with warranty, on Sunday; and the action was for breach of warranty. The plaintiffs were nonsuited, Bayley, J., again delivering the opinion, and saying, that he had given too narrow a construction to the Act in the previous case, and

*Fennell v.  
Ridler.*

<sup>1</sup> 1 Taunt. 131.

<sup>2</sup> 3 B. & Cr. 232.

<sup>3</sup> 5 B. & Cr. 406.

that it was intended to regulate private conduct as well as to promote public decency.

Smith v. Sparrow.

Next, in 1827, came *Smith v. Sparrow*,<sup>1</sup> in the Common Pleas. The plaintiff's broker made an agreement on Sunday for a sale to defendant, and at first refused to deliver a written note of the sale (without which it would not have been complete under the Statute of Frauds) until the next day, but finally yielded to defendant's importunity, and gave him a bought note, in which the vendor's name was not mentioned. The broker also entered the sale on his book on Sunday, with a blank for the vendor's name. On Monday the blank was filled up with the vendor's name, before the broker had seen the vendor, or informed him of the sale. The plaintiff's action was for damages, for breach of this contract, and he was held not entitled to recover. Best, C. J., expressed a doubt about the decision in *Bloxsome v. Williams*, and warmly eulogised *Fennell v. Ridler*. Park, J., joined in the commendation of the last-mentioned case, and said he did "not think this Court was right in the decision of *Drury v. Defontaine*."

Williams v. Paul.

In *Williams v. Paul*,<sup>2</sup> decided in 1830, it was held, that where a sale was made on Sunday, and the buyer retained the thing bought, and afterwards [made a new promise to pay, he was liable, not for the price agreed on in the void bargain, but for a *quantum meruit* on the new promise.

Simpson v. Nicholls.

But in *Simpson v. Nicholls*,<sup>3</sup> Parke, B., expressed the opinion that the decision in *Williams v. Paul* could not be supported in law.<sup>4</sup> In *Simpson v. Nicholls*, the defendant pleaded the nullity of the sale made on Sunday, and plaintiff replied "*precludi non*, because although the said goods were sold and delivered by the plaintiff to the defendant at the time and in the manner in the plea alleged, yet the defendant *after the sale and delivery of the said goods kept and retained the same*, and hath ever since kept and retained the same *without in any manner returning or offer-*

<sup>1</sup> 4 Bing. 84.

rected report in 5 M. & W. 702.

<sup>2</sup> 6 Bing. 653.

<sup>4</sup> See the American cases referred

<sup>3</sup> 3 M. & W. 244, and S. C. cor- to, *post*, p. 417

*ing to return the same to the plaintiff*, and thereby hath become, liable," &c. Replication held bad on demurrer, because even on the authority of *Williams v. Paul*, which was doubted, a fresh promise was necessary, and this was not alleged in the replication.

In *Scarfe v. Morgan*,<sup>1</sup> the defendant pleaded illegality under the statute against a claim by a farmer for the services of his stallion in covering the defendant's mare on Sunday, but the defence was overruled. *Scarfe v. Morgan.*

The statute 27 & 28 Vict. c. 27, s. 11, prohibits the sale for the use of a vessel, by any maker of, or dealer in, chain cables or anchors, of any chain cables whatever, or any anchor exceeding in weight 168 pounds, not previously tested and duly stamped according to the provisions of the Act. *Sale of chain cables and anchors.*

In America, the law in general upon the subjects embraced in this chapter is in accordance with the English law. *Cases in America.*

The cases in our courts upon contracts of sale where the thing sold was intended by both parties for illegal purposes, or was transferred with a knowledge on the part of the vendor that the buyer intended to use it for illegal purposes, were elaborately reviewed and discussed in the Supreme Court of the United States in two cases, *Armstrong v. Toler*, reported in 11 Wheaton, 258, and *McBlair v. Gibbes*, 17 Howard, 232. The principles established by these two cases may be summed up as follows:—

*First.*—No action lies on any contract, the consideration of which is either wicked in itself, or prohibited by law.

*Secondly.*—A collateral contract made in aid of one tainted by illegality cannot be enforced.

*Thirdly.*—A collateral contract, disconnected from the illegal transaction which was the basis of the first contract, is not illegal, and may be enforced.

<sup>1</sup> 4 M. & W. 270.

In relation to sales made on Sunday, nearly if not all the States have passed laws substantially in accordance with the 29 Charles II. c. 7, and there is very great diversity of opinion on the questions which have arisen under these statutes. In many of the States the law makes no distinction between sales made by a party in his ordinary calling and any other sale, but forbids all secular business on Sunday. A note given for property sold on Sunday is held of course to be invalid in the hands of the payee; but it is not settled whether such a note is void in the hands of an innocent indorsee.<sup>1</sup>

A sale is there held not to be invalid although commenced on Sunday, if not completed till another day, nor if it merely grow out of a transaction which took place on Sunday.<sup>2</sup> And a note, though signed on Sunday, may be enforced, if delivered on some other day;<sup>3</sup> and when the vendee has obtained possession of the property sold to him on Sunday, with the assent of the vendor, it is held that the title has passed, and that he may maintain his possession under the void contract as against both the vendor and his creditors.<sup>4</sup>

There is great conflict of decisions on the question whether the vendee becomes liable (either under a new contract, or by reason of a ratification of the old one) when he takes possession of the thing sold on some other day, after making a purchase of it on Sunday. The case of *Williams v. Paul*,<sup>5</sup> and the observations of Parke, B., seriously questioning its authority,<sup>6</sup> have been much discussed in the American courts. In the case of *Adams v. Gay*,<sup>7</sup> the purchaser refused, at the request of the vendor,

<sup>1</sup> *Allen v. Deming*, 14 N. Hamp. 113; *Saltmarsh v. Tuthill*, 13 Alab. 390.

<sup>2</sup> *Stackpole v. Simonds*, 3 Foster (N. Hamp.), 229; *Smith v. Bean*, 15 N. Hamp. 577; *Sumner v. Jones*, 24 Verm. 317; *Goss v. Whitney*, 24 Verm. 187; *Butler v. Lee*, 11 Ala. 885.

<sup>3</sup> *Hilton v. Houghton*, 35 Maine,

143; *Lovejoy v. Whipple*, 18 Verm. 379; *Clough v. Davis*, 9 N. Hamp. 500; *Hill v. Dunham*, 7 Gray, 543.

<sup>4</sup> *Smith v. Bean*, 15 N. Hamp. 577; *Allen v. Deming*, 14 N. Hamp. 133.

<sup>5</sup> 6 Bing. 653.

<sup>6</sup> *Ante*, p. 414.

<sup>7</sup> 19 Verm. 358.

to rescind the contract and return the thing sold, and this was held to be an affirmation of the Sunday bargain, and to render the purchaser liable; and in *Sargent v. Butts*<sup>1</sup> the same Court held that a subsequent promise ratified an award made on Sunday, so that an action would lie on the award. So in *Sumner v. Jones*,<sup>2</sup> where a note was given on Sunday for the price of a horse sold that day, and the buyer afterwards made payments on account of the note, it was held that these payments, coupled with his retaining the horse in his possession, were a ratification of the contract, entitling the vendor to recover the sum remaining due on the note. In Alabama,<sup>3</sup> however, and in New Hampshire,<sup>4</sup> the courts have rather been inclined to follow the opinion of Parke, B., than the decision in *Williams v. Paul*. In the case of *Boutelle v. Melendy*,<sup>5</sup> the New Hampshire Court expressly held that an illegal contract is incapable of ratification or of forming a good consideration for a subsequent promise.

The French Civil Code, Art. 1133, provides that "the consideration (*la cause*) of a contract is unlawful, when prohibited by law, or contrary to good morals or public order." French Code. Under this article the decisions are very much the same as those in our own reports, and they are collected by Sirey in his *Code Civil Annoté*,<sup>6</sup> under Arts. 902 and 1133. One of the cases establishes the illegality of a bargain not likely to occur in England: that by which an organiser of dramatic successes (*un entrepreneur de succès dramatiques*) engages to ensure, by means of hired applauders (*claqueurs*), the success of actors or of pieces performed by them.<sup>5</sup>

<sup>1</sup> 21 Vermont, 99.

<sup>2</sup> 24 Vermont, 317.

<sup>3</sup> *Butler v. Lee*, 11 Alab. 885.

<sup>4</sup> *Allen v. Deming*, 14 N. Hamp.

133, and *Boutelle v. Melendy*, 19 N. Hamp. 196.

<sup>5</sup> Sirey, V. 41, 1, 625; D. P. 41, 1,

128.



# BOOK IV.

## PERFORMANCE OF THE CONTRACT.

### PART I.

#### CONDITIONS.

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Preliminary remarks.

THE rules of law on the subject of conditions in contracts are very subtle and perplexing. Whether a promise made or an obligation assumed by one party to a contract is dependent on, or independent of, the promise made by the other; whether it be a condition to be performed before or concurrently with any demand on the other party

for a compliance with his promise ; or whether it may be neglected, at the peril indeed of a cross action, but without affecting the right to sue the other party, are questions on which the decisions have been so numerous (and in many instances so contradictory), and the distinctions so refined, that no attempt can here be made to do more than enunciate a few general principles. An examination of the cases will be restricted to such as have special reference to sales of goods.<sup>1</sup>

The subjects of representation, warranty, conditions, and fraud, run so closely together, and are so frequently intertwined, that it is very difficult to treat each separately ; and it will be convenient here, although these different topics need independent consideration, to give an outline of the general principles applicable to the whole subject, as recognised in the most recent decisions. A *representation* is a statement or assertion made by one party to the other, before or at the time of the contract of some matter or circumstance relating to it. A representation, even though contained in a written instrument, is *not an integral part of the contract*. Hence it follows, that even if it be untrue, the contract in general is not broken, nor is the untruth any cause of action, unless made fraudulently. To this general rule there is a special exception, in the case of marine policies of insurance, founded on reasons which need not be here discussed. The false *representation* becomes a *fraud*, as has been already explained (Book III. Ch. 2), when the untrue statement was made with a knowledge of its untruth, or dishonestly, or perhaps with reckless ignorance whether it was true or false ;<sup>2</sup> or when it differs from the truth so grossly and unreasonably as to evince a dishonest purpose.<sup>3</sup> When the representation is made in writing, instead of words, it is plain that its *nature* is not

General principles and definitions.

Representation.

<sup>1</sup> For the general subject, see the notes to *Portage v. Cole*, 1 Wms. Saund. 320, and to *Peeters v. Opie*, 2 Wms. Saund. 352 ; *Cutter v. Powell*, 2 Smith's L. C. 1, and the numerous authorities in the notes ; *Leake on Contracts*, Ch. III. Sec. 2.

<sup>2</sup> *Elliott v. Von Glehn*, 13 Q. B. 632 ; 18 L. J., Q. B. 221 ; *Whealton v. Hardesty*, 8 E. & B. 232 ; 27 L. J., Q. B. 241.

<sup>3</sup> *Barker v. Windle*, 6 E. & B. 675 ; S. C. 25 L. J., Q. B. 349.

thereby altered, and in either case a question may arise whether the statement be not something more than a mere representation, whether it be not *part of the contract*. On a written instrument this is a question of construction, one of law for the Court, not one of fact for the jury. Whenever it is determined, that a statement is really a substantial part of the contract then comes the nice and difficult question, Is it a *condition precedent*? or Is it an *independent agreement*? a breach of which will not justify a repudiation of the contract, but only a cross action for damages. The cases show distinctions of extreme nicety on this point, of which a striking example is afforded in charter-parties, where a statement that a vessel is to sail or to be ready to receive cargo on a given day, has been decided to be a condition,<sup>1</sup> but a stipulation that she shall sail with all convenient speed, or within a reasonable time, is held to be an independent agreement.<sup>2</sup> In determining whether a representation or statement is a condition or not, the rule laid down by Lord Mansfield, in *Jones v. Barkley*,<sup>3</sup> remains unchanged, "that the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties, and that however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." And the rules for discovering the intention are mainly these:—

Rules of construction for discovering intention.

1. Where a day is appointed for doing any act, and the day is to happen or *may* happen before the promise by the other party is to be performed, the latter may bring action before performance, which is not a condition precedent: *aliter*, if the day fixed is to happen after the performance, for then the performance is deemed to be a condition precedent.

<sup>1</sup> *Glaholm v. Hays*, 2 M. & G. 257; *Oliver v. Fielden*, 4 Ex. 135; *Croockewit v. Fletcher*, 1 H. & N. 893; 26 L. J., Ex. 153; *Seeger v. Duthie*, 8 C. B., N. S. 45; 29 L. J., C. P. 253.

183; 26 L. J., Ex. 26; *Dimech v. Corlett*, 12 Moore, P. C. C. 199; *Clipsam v. Vertue*, 5 Q. B. 265; *M'Andrew v. Chapple*, 35 L. J., C. P. 281; L. R. 1, C. P. 643.

<sup>2</sup> *Tarrabochia v. Hickie*, 1 H. & N.

<sup>3</sup> 2 Doug. 684-691.

2. When a covenant or promise goes only to *part* of the consideration, and a breach of it may be paid for in damages, it is an independent covenant, not a condition.

3. Where the mutual promises go to the *whole* consideration on both sides, they are mutual conditions precedent: formerly called dependent conditions.<sup>1</sup>

4. Where each party is to do an act at the same time as the other, as where goods in a sale for cash are to be delivered by the vendor, and the price to be paid by the buyer; these are concurrent conditions, and neither party can maintain an action for breach of contract, without averring that he performed or offered to perform what he himself was bound to do.<sup>2</sup>

5. Where from a consideration of the whole instrument it is clear that the one party relied upon his remedy, and not upon the performance of the condition by the other, such performance is not a condition precedent. But if the intention was to rely on the performance of the promise, and not on the remedy, the performance is a condition precedent.<sup>3</sup>

In applying these rules of construction, the circumstances under which the contract was made, and the purpose for which it was made, are to be taken into consideration. The same statement may, under certain circumstances, be merely a description or representation, and under others, the most substantial stipulation in the contract; as for instance, if a vessel were described in a charter-party as a "French vessel," these words would be merely a description in time of peace, but if England were at war, and France at peace, with America, they would form a condition precedent of the most vital importance.<sup>4</sup>

<sup>1</sup> See *Glazebrook v. Woodrow*, 8 T. R. 366.

<sup>2</sup> These rules are (in substance) given in 1 Wms. Saunders, 320 b.; and adopted in the notes to *Cutter v. Powell*, 2 Sm. L. C. 1. The general statement of the law applicable to conditions in the preliminary remarks in this chapter, is mainly

based on the judgment of the Ex. Ch. in *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204.

<sup>3</sup> *Per Jervis, C. J.*, in *Roberts v. Brett*, 18 C. B. 561; 25 L. J., C. P. 280.

<sup>4</sup> *Behn v. Burness*, *ut supra*, *per Williams, J.*

Condition precedent may be changed into warranty by acceptance of partial performance.

Although a man may refuse to perform his promise till the other party has complied with a condition precedent, yet if he has received and accepted a substantial part of that which was to be performed in his favour, the *condition precedent changes its character, and becomes a warranty, or independent agreement*, affording no defence to an action, but giving right to a cross action for damages.<sup>1</sup> The reason is, that it would be unjust under such circumstances, that a party who has received a part of the consideration for which he bargained, should keep it and pay nothing, because he did not receive the *whole*. The law, therefore, obliges him to perform his part of the agreement, and leaves him to his action of damages against the other side, for the imperfect performance of the condition. It is in the application of this rule that the cases have not been harmonious, and the practitioner is often embarrassed in advising; for the courts draw a distinction between what is and what is not a substantial part of the contract, in determining whether the original condition precedent has become converted *ex post facto* into an independent agreement. Some cases are referred to in the note.<sup>2</sup>

Condition precedent must be strictly performed before the party bound to fulfil it can demand compliance from the other.

Apart from this modification of the principle, in cases where one of the parties has accepted a portion of the benefit of the condition, which was stipulated in his favour, and has thus *ex post facto* changed its nature, the rule is very general and uniform that the condition precedent must be fully and strictly performed before the party on whom its fulfilment is incumbent can call on the other to comply with his promise.

Performance may be waived.

But the necessity for performing the condition precedent may be *waived* by the party in whose favour it is stipulated, either expressly, or by the implication resulting from his

<sup>1</sup> *Ellen v. Topp*, 6 Exch. 424; *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204.

<sup>2</sup> *Jonassohn v. Young*, 4 B. & S. 296; 32 L. J., Q. B. 385; *Graves v. Legg*, 9 Exch. 709; 23 L. J., Ex. 228; *White v. Beaton*, 7 H. & N. 42; 30

L. J., Ex. 373; *Hoare v. Rennie*, 5 H. & N. 19; 29 L. J., Ex. 73; *Pust v. Dowie*, 5 B. & S. 20; 32 L. J., Q. B. 179; *Ellen v. Topp*, 6 Ex. 424; *Behn v. Burness*, 3 B. & S. 751; 32 L. J., Q. B. 204; *Dimech v. Corlett*, 12 Moore, P. C. 199.

acts or conduct. This waiver is implied in all cases in which the party entitled to exact performance either hinders or impedes the *other party* in fulfilling the condition, or incapacitates *himself* from performing his own promise, or absolutely refuses performance, so as to render it idle and useless for the other to fulfil the condition.

No authority is needed, of course, for the proposition that the party in whose favour the condition has been imposed may expressly waive it.

The cases, however, are numerous to establish the propositions above stated, in relation to the *implied* waiver.

If a man offer to perform a condition precedent in favour of another, and the latter refuse to accept the performance, or hinder or prevent it, this is a waiver, and the latter's liability becomes fixed and absolute. As long ago as 1787, Ashhurst, J., in delivering the opinion of the King's Bench, in *Hotham v. East India Company*,<sup>1</sup> said that it was evident from common sense, and therefore needed no authority to prove it, that if the performance of a condition precedent by the plaintiff had been rendered impossible by the neglect or default of the defendant, "it is equal to performance."<sup>2</sup> On the same principle a positive absolute refusal by one party to carry out the contract, or his conduct in incapacitating himself from performing his promise, is in itself a complete breach of contract on his part, and dispenses the other party from the useless formality of tendering performance of the condition precedent: as if A. engage B. to write articles for a specified term in a periodical publication belonging to A., and before the end of the term A. should discontinue the publication; or if he agree to sell to B. a specified ox, and before the time for delivery should kill and consume the animal; or to load specified goods on board a vessel on a day fixed, and before that day should

Waiver implied in certain cases. Performance obstructed.

Positive refusal by the other party to fulfil contract.

<sup>1</sup> 1 T. R. 645.

<sup>2</sup> See, also, *Pontifex v. Wilkinson*, 1 C. B. 75; *Holme v. Guppy*, 3 M. & W. 387; *Armitage v. Insole*, 14 Q. B. 728; *Ellen v. Topp*, 6 Ex. 424;

*Laird v. Pim*, 7 M. & W. 474; *Cort v. Ambergate Railway Company*, 17 Q. B. 127; 20 L. J., Q. B. 460; *Russell v. Bandeira*, 13 C. B., N. S. 149; 32 L. J., C. P. 68.

send them abroad on a different vessel, it is plain that it would be futile for B., in the cases supposed, to tender articles for insertion in the discontinued publication, or the price of the ox already consumed, or to offer to receive on his vessel goods already sent out of the country; and *lex neminem ad vana cogit*.<sup>1</sup>

Mere assertion that a party will be unable or unwilling to comply, no waiver.

But a mere assertion that the party will be unable or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end.<sup>2</sup> The authorities will be found collected and considered in the notes to *Cutter v. Powell*, 2 Smith's Leading Cases, 1.

Impossibility as an excuse.

It is no excuse for the non-performance of a condition that it is impossible for the obligor to fulfil it, if the performance be in its nature possible. But if a thing be physically impossible, *quod natura fieri non concedit*, or be rendered impossible by the act of God, as if A. agree to sell and deliver his horse, Eclipse, to B. on a fixed future day, and the horse die in the interval, the obligation is at an end.<sup>3</sup>

<sup>1</sup> *Cort v. The Ambergate Railway Company*, 17 Q. B. 127; 20 L. J., Q. B. 460; *Bowdell v. Parsons*, 10 East, 59; *Amory v. Brodrick*, 5 B. & Ald. 712; *Short v. Stone*, 8 Q. B. 358; *Caines v. Smith*, 15 M. & W. 189; *Reid v. Hoskins*, 4 E. & B. 979; 25 L. J., Q. B. 55, and 26 L. J., Q. B. 5; *Avery v. Boden*, 5 E. & B. 714; 6 E. & B. 953; 25 L. J., Q. B. 49, and 26 L. J., Q. B. 8; *Bartholomew v. Markwick*, 15 C. B., N. S. 710; 33 L. J., C. P. 145; *Franklin v. Miller*, 4 A. & E. 599; *Planché v. Colburn*, 8 Bing. 14; *Robson v. Drummond*, 2 B. & Ad. 803; *Inchbald v. The Western Neilgherry Coffee Company*, 17 C. B., N. S. 783; 34 L. J., C. P. 15.

<sup>2</sup> *Barwick v. Buba*, 2 C. B., N. S. 563; 26 L. J., C. P. 280; *Ripley v. McClure*, 4 Ex. 345; *Hochster v. De Latour*, 2 E. & B. 678; 22 L. J., Q. B. 455; *Avery v. Boden*, 5 E. & B. 714; 6 E. & B. 953; 25 L. J., Q. B. 49; 26 L. J., Q. B. 8; *The Danube Railway Company v. Xenos*, 11 C. B., N. S. 152; 13 C. B., N. S. 825; 31 L. J., C. P. 84, 284; *Philpots v. Evans*, 5 M. & W. 475.

<sup>3</sup> *Shep. Touch*. 173, 382; Co. Lit. 206 a; *Faulkner v. Lowe*, 2 Ex. 595; *Williams v. Hill*, Palm. 548; *Laughter's case*, 5 Rep. 21 b; *Hall v. Wright*, 1 E. B. & E. 746; 27 L. J., Q. B. 145; 2 Wms. Saund. 420; *Tasker v. Shepherd*, 6 H. & N. 575; 30 L. J., Ex. 207.

In *Taylor v. Caldwell*,<sup>1</sup> the whole law on this subject was reviewed by Blackburn, J., who gave the unanimous decision of the Court after advisement. It was an action for breach of a promise to give to the plaintiff the use of a certain music-hall for four specified days, and the defence was that the hall had been burnt down before the appointed days, so that it was impossible to fulfil the condition. This excuse was held valid. The learned judge there stated as an example, that "where a contract of sale is made, amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day, there, if the chattels without the fault of the vendor perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible. That this is the rule of English law, is established by the case of *Rugg v. Minet*."<sup>2</sup> After some further illustrations, the rule was laid down as follows: "*The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied, that the impossibility arising from the perishing of the person or thing shall excuse the performance.*" This case was followed in *Appleby v. Meyers*, in *Cam. Scacc*.<sup>3</sup>

*Taylor v. Caldwell.*

And a party is equally excused from the performance of his promise when a *legal impossibility* supervenes. If, after promise made, an Act of Parliament is passed rendering the performance illegal, the promise is at an end, and the obligor no longer bound.<sup>4</sup>

*Legal impossibility.*

But if the thing promised be possible in itself, it is no excuse that the promiser became unable to perform it by causes beyond his own control, for it was his own fault to run the risk of undertaking unconditionally to fulfil a

*Thing possible in itself.*

<sup>1</sup> 3 B. & S. 826; 32 L. J., Q. B. 164.

<sup>2</sup> 11 East, 210.

<sup>3</sup> *Appleby v. Meyers*, L. R. 1, C. P. 615; 35 L. J., C. P. 295, reversed in *Cam. Scacc*. L. R. 2, C. P. 651; 36 L. J., C. P. 831.

<sup>4</sup> *Brewster v. Kitchin*, 1 Salk. 198; *Davis v. Cary*, 15 Q. B. 418; *Doe v. Rugely*, 6 Q. B. 107; *Wynn v. Shrop. Un. Railway and Canal Company*, 5 Ex. 420; *Brown v. Mayor of London*, 9 C. B., N. S. 726, and 31 L. J., C. P. 280.



promise, when he might have guarded himself by the terms of his contract.

Kearon v.  
Pearson.

Thus, in *Kearon v. Pearson*,<sup>1</sup> the defendant undertook to deliver a cargo of coals on board of a vessel with the usual despatch. The defendant commenced the delivery, but a sudden frost occurred, so that no more coal could be brought from the colliery by the "flats" navigating the canal. The delivery was thus delayed about thirty days, and the Court was unanimous in holding that the defendant was not excused from performing his promise.

Barker v.  
Hodgson.

So in *Barker v. Hodgson*,<sup>2</sup> the defendant attempted to excuse himself for not furnishing a cargo in a foreign port, on the ground that a pestilence broke out in the port, and all communication between the vessel and the shore was interdicted by the authorities, so that it was unlawful and impracticable to send the cargo on board, and Lord Ellenborough said: "Perhaps it is too much to say that the freighter was compellable to load his cargo; but if he was unable to do the thing, is he not answerable upon his covenant? \* \* \* If, indeed, the performance of this contract had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides; and this defendant, inasmuch as he had been thus compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages."

Kirk v. Gibbs.

\*So in *Kirk v. Gibbs*,<sup>3</sup> the charterers of a vessel agreed to furnish to the captain, at Pisco, in Peru, the pass necessary to enable him to load a cargo of guano "free of expense, within twenty-four hours of his application." The charterers having loaded an insufficient cargo, pleaded in an action against them for this breach of the charter-party, that by the

<sup>1</sup> 7 H. & N. 386; 31 L. J., Ex. 1.

<sup>2</sup> 1 H. & N. 810; 26 L. J., Ex. 209.

<sup>3</sup> 3 M. & S. 267.

laws of the republic of Peru no guano could be loaded without a pass from the government, and that on inspection of the vessel the government refused a pass, and that on the plaintiff's repairing the vessel, a pass was granted for only a limited quantity, which was loaded, and that no more could be loaded without exposing both vessel and cargo to seizure. On demurrer, this plea was held bad. But the insufficiency of the plea consisted in this, that it did not allege that the owners of the vessel were in default, or that the vessel was not really fit to carry a full cargo, but only that the government officers refused the permit; and the charterer had made an absolute promise to furnish one, from which nothing could excuse him unless hindered by some act or default of the other party.

There are two old cases in which the vendors took advantage of the buyers' ignorance of arithmetic to impose on them conditions practically impossible.

In *Thornburn v. Whitacre*,<sup>1</sup> the declaration was in case, and alleged that the defendant, in consideration of 2s. 6d. paid, and of 4l. 17s. 6d. promised to be paid on the defendant's performance, agreed to deliver to the plaintiff two grains of rye-corn on the following Monday, four grains on the Monday after, eight grains on the Monday after, *et progressu sic deliberaret quolibet alio die Lunæ successive infra unum annum ab eodem 29 Martii bis tot grana Secalis quot die Lunæ proximo præcedente respective deliberanda forent.*" The defendant demurred, on the ground that the performance was impossible, *Salkeld* saying all the rye in the world would not make so much, and arguing that there were three impossibilities that would excuse an obligor,—*impossibilitas legis*, as a promise to murder a man; *impossibilitas rei*, as a promise to do a thing in its own nature impossible; and *impossibilitas facti*, where though the thing was possible in nature, yet man could not do it, as to touch the heavens, or to go to Rome in a day. But Holt, C. J., said that *impossibilitas rei et facti* were all one: that the defendant's promise

*Thornburn v.  
Whitacre.*

<sup>1</sup> 2 Lord Raym. 1164.

was only impossible with respect to his inability to perform it, and that the words *quolibet alio die Lunæ* must be construed as if written in English, every other Monday, *i.e.*, every next Monday but one, which would bring the obligation much nearer the defendant's ability to perform it. After some further argument, Salkeld, perceiving the opinion of the Court to be adverse to the defendant, offered the plaintiff to return the half-crown and give him his costs, which was accepted, and no judgment was delivered.

James v.  
Morgan.

The reporter says that in arguing this case, the old case of *James v. Morgan*<sup>1</sup> was remembered. The report is so concise, that it is given entire. "K. B., Mich. 15, Car. 2. Assumpsit to pay for a horse a barley-corn a nail, doubling it every nail: and avers that there were 32 nails in the shoes of the horse, which, being doubled every nail, came to 400 quarters of barley: and on non-assumpsit pleaded, the cause being tried before Hyde, at Hereford, he directed the jury to give the value of the horse in damages; and so they did, and it was afterwards moved in arrest of judgment,<sup>2</sup> for a small fault in the declaration, which was overruled, and judgment given for the plaintiff." The Hyde here mentioned was not the well-known Sir Nicholas Hyde, *temp.* Charles I., but Sir Robert Hyde, the Chief Justice, who had just been placed on the bench, and only remained in office two years (Foss' Tab. Cur. 66). The ground of his decision nowhere appears. For further authorities upon this subject of impossible conditions, the reader is referred to the cases in the note.<sup>3</sup>

The conditions most frequently occurring in contracts of sale, will now be considered.

Sale dependent

It is not uncommon to make the performance of a sale

<sup>1</sup> 1 Levinz, 111.

<sup>2</sup> 1 Keble, 569.

<sup>3</sup> Reid v. Hoskins, 6 E. & B. 953; 26 L. J., Q. B. 5; Esposito v. Bowden, 4 E. & B. 963; 7 E. & B. 763; 27 L. J., Q. B. 17; Pole v. Cetoovitch, 9 C. B., N. S. 430; 30 L. J., C. P. 102; Mayor of Berwick v. Oswald, 3 E. & B. 665, and 5 H. of L. C. 856;

Atkinson v. Ritchie, 13 East, 533; Adams v. Royal Mail Company, 5 C. B., N. S. 492; Mills v. Auriol, 1 H. Bl. 433, and 4 T. R. 94, in error; Jervis v. Tomkinson, 1 H. & N. 195; 26 L. J., Ex. 41; Paradine v. Jane, Ayleyn, 27; Chitty on Cont. 646; Leake on Cont. c. iii., s. 111; Broom's Leg. Max. 245.

dependent on an act to be done by a third person. Such conditions must be complied with before rights dependent on them can be enforced, and if the third party refuse, even unreasonably, to perform the act, this will not dispense with it. Thus, in *Brogden v. Marriott*,<sup>1</sup> the vendor sold a horse for one shilling cash, and a further payment of 200*l.*, provided the horse should trot eighteen miles within one hour, the task to be performed within one month, and "J. N., to be the judge of the performance." It was held, to be no defence to the buyer's action for the delivery of the horse, that J. N. refused to be present at the trial, and Tindal, C. J., said it was a "condition which the defendant should have shown to have been performed, or that the performance was prevented by the fault of the opposite party."

on an act to be done by third person.

*Brogden v. Marriott.*

So in *Thurnell v. Balbirnie*,<sup>2</sup> the declaration averred an agreement that defendant should purchase the plaintiff's goods "at a valuation to be made by certain persons, viz., Mr. Newton and Mr. Matthews, or their umpire," the former in behalf of the plaintiff, and the latter in behalf of the defendant: that Newton was ready and willing to value the goods, and that the defendant and Matthews, though notified and requested to proceed with the valuation, and to meet Newton for that purpose, continually neglected and refused to do so; and that the defendant was notified that Newton would meet Matthews or *any other person whom the defendant might nominate for the purpose of making the valuation*, but the defendant wholly neglected, &c. To this declaration there was a special demurrer for want of an allegation that the defendant *hindered or prevented* Matthews from making the valuation, and the demurrer was sustained.

*Thurnell v. Balbirnie.*

On the same principle it has been held, in other contracts on conditions of this kind, that the party who claims must show the performance of the condition on which his claim depends, or that the opposite party prevented or waived the

The party who claims must show performance of condition.

<sup>1</sup> 2 Bing. N. C. 473.

<sup>2</sup> 2 M. & W 786.

performance. On an agreement to do work which is to be settled for according to the measurement of a named person, the measurement by that person is a condition precedent to the claim for payment;<sup>1</sup> on an insurance where the claim for payment was made to depend on a certificate from the minister of the parish, that the insured was of good character, and his claim for loss *bond fide*, it was held, that the insured could not recover without the certificate, even though the minister unreasonably refused to give it:<sup>2</sup> and where building work was to be paid for on a certificate in writing, by an architect, that he approved the work, no recovery could be had until the certificate was given.<sup>3</sup>

If condition rendered impossible by vendee, vendor may recover quantum valebat.

If the performance of the condition for a valuation be rendered impossible by the act of the vendee, the price of the thing sold must be fixed by the jury on a *quantum valebat*, as in *Clarke v. Westrope*,<sup>4</sup> where the outgoing tenant sold the straw on a farm to the incomer at a valuation to be made by two indifferent persons, but pending the valuation the buyer consumed the straw. In like manner, where an employer colluded with an architect, upon whose certificate the builder's claim for payment depended, so that the builder was prevented from getting the certificate, a declaration setting forth that fact in terms sufficient to aver fraud, was held maintainable by all the Barons of the Exchequer.<sup>5</sup>

Sale dependent on happening of event.  
Duty to give notice.  
General rule of law.

The condition on which a sale depends may be the happening of some event, and then the question arises as to the duty of the obligee to give notice that the event has happened. As a general rule, a man who binds himself to do anything on the happening of a particular event, is bound to take notice, at his own peril, and to comply with his promise when the event happens.<sup>6</sup> But there are cases in which from the very nature of the transaction, the party

<sup>1</sup> *Mills v. Bayley*, 2 H. & C. 36; 32 L. J., Ex. 179.

<sup>2</sup> *Worsley v. Wood*, 6 T. R. 720.

<sup>3</sup> *Morgan v. Birnie*, 9 Bing. 672; *Clarke v. Watson*, 18 C. B., N. S. 278; 34 L. J., C. P. 148; *Roberts v. Watkins*, 14 C. B., N. S. 592; 32 L.

J., C. P. 291; *Goodyear v. Mayor of Weymouth*, 35 L. J., C. P. 12.

<sup>4</sup> 18 C. B. 765; 25 L. J., C. P. 287.

<sup>5</sup> *Batterbury v. Vyse*, 2 H. & C. 42; 32 L. J., Ex. 177.

<sup>6</sup> 2 Wms. Saunders, 62 a. n. 4.

bound on a condition of this sort is entitled to notice from the other of the happening of the event on which the liability depends. Thus, in *Haule v. Hemyng*,<sup>1</sup> it was held, *Haule v. Hemyng*,<sup>1</sup> that the vendor who had sold certain weys of barley, to be paid for at as much as he should sell for to any other man, could not maintain an action against the purchaser before giving him notice of the price at which he had sold to others, the reason being that the persons to whom the plaintiff might sell were perfectly indefinite, and at his own option. But no notice is necessary where the particular person whose action is made a condition of the bargain is named, as if in *Haule v. Hemyng* the bargain had been that the purchaser would pay as much as the vendor should get for the barley from J. S.,<sup>2</sup> for the party bound in this event is sufficiently notified by the terms of his contract, that a sale is or will be made to J. S., and agrees to take notice of it; there is a particular individual specified, and no option to be exercised by the vendor. And it seems that this is the true test, viz., that if the obligee has reserved any option to himself, by which he can control the event on which the duty of the obligor depends, then he must give notice of his own act before he can call upon the obligor to comply with his engagement. Therefore, in *Vyse v. Wakefield*,<sup>3</sup> where the defendant had covenanted to appear at any time or times thereafter, at an office or offices, for the insurance of lives within London or the bills of mortality, and answer such questions as might be asked respecting his age, &c., in order to enable the plaintiff to insure his life, and *would not afterwards do any act to prejudice the insurance*, the declaration alleged that the defendant did, in part performance of his covenant, appear at a certain insurance office, and that plaintiff insured the defendant's life, and that the policy contained a proviso, by which it was to become void, if the defendant went beyond the limits of

True test of the necessity of notice.

*Vyse v. Wakefield.*

<sup>1</sup> Cited in 6 M. & W. 454, in the opinion delivered by Parke, B., in *Vyse v. Wakefield*, from which the doctrine in the text is chiefly extracted.

<sup>2</sup> Viner's Ab. Condition (A. d.), pl. 15.

<sup>3</sup> 6 M. & W. 442.

Europe. Breach,—that the defendant went beyond the limits of Europe, to wit, to Canada. Special demurrer, for want of averment, that the plaintiff had given notice to the defendant that he had effected an insurance on the life of the defendant, and that the policy contained the proviso alleged in the declaration. Held, that the declaration was bad.

Sale of goods  
"to arrive."

A very frequent contract among merchants is a sale of goods "to arrive." It is not always easy to determine whether the language used in such cases implies a condition or not, or what the real condition is. The earlier cases were at *Nisi Prius*, but in recent times these contracts have been multiplied to a great extent.

Boyd v. Siffkin.

In *Boyd v. Siffkin*,<sup>1</sup> the sale was of "32 tons, more or less, of Riga Rhine hemp *on arrival per Fanny and Almira, &c.*," and the vessel arrived, but without the hemp. Held, that the sale was conditional on the arrival, not of the vessel, but of the hemp. And the same conclusion was adopted by the Court in *Hawes v. Humble*,<sup>2</sup> where the sale was thus expressed: "I have this day sold for and by your order *on arrival* 100 tons, &c."

Hawes v.  
Humble.

Idle v. Thornton.

In *Idle v. Thornton*,<sup>3</sup> the contract was for "200 casks first sort yellow candle tallow, at 68s. per cwt. *on arrival*: if it should not arrive on or before the 31st December next, the bargain to be void: to be taken from the king's landing scale, &c., ex *Catherina, Evers*." The vessel with the tallow on board was wrecked off Montrose, but the greater part of the tallow was saved, and might have been forwarded to London by the 31st December, but was not so forwarded, and was sold at Leith. Lord Ellenborough held that the contract was conditional on the arrival of the tallow in London *in the ordinary course of navigation*, and that the vendor was not bound, after the shipwreck, to forward it to London: at all events, not without a request and offer of indemnity by the purchaser.

Lovatt v.  
Hamilton.

In *Lovatt v. Hamilton*,<sup>4</sup> the contract was, "We have sold you 50 tons of palm oil, *to arrive per Mansfield, &c.* In

<sup>1</sup> 2 Camp. 326.

<sup>2</sup> 3 Camp. 274.

<sup>3</sup> 2 Camp. 327, n.

<sup>4</sup> 5 M. & W. 639.

case of non-arrival, or the vessel's not having so much in, after delivery of former contracts, this contract to be void." During the voyage a part of the cargo of the *Mansfield* was trans-shipped by an agent of the vendors into another vessel belonging to the vendors, but without their knowledge, and the oil arrived safely on *that* vessel. The *Mansfield* also arrived safely. The question was whether the arrival of the oil in the *Mansfield* was a condition precedent to the buyer's right to claim the delivery, and the Court, without hearing the vendor's counsel, held the affirmative to be quite clear.

In *Alewyn v. Pryor*,<sup>1</sup> the sale was of "all the oil on board the *Thomas* \* \* \* *on arrival* in Great Britain: to be delivered by sellers on a wharf in Great Britain to be appointed by the buyers with all convenient speed, *but not to exceed the 30th day of June next, &c.*" The vessel did not arrive till the 4th July, and the purchaser refused to take the oil. Held, that the arrival *by the 30th June* was a condition precedent, and not a warranty by the seller.

*Alewyn v.  
Pryor.*

In *Johnson v. Macdonald*,<sup>2</sup> the sale was of 100 tons of nitrate of soda "to arrive ex *Daniel Grant*," and there was a memorandum at foot, "should the *vessel* be lost, this contract to be void." The vessel arrived without any nitrate of soda, and it was strenuously contended that the expression "to arrive," when coupled with the stipulation in the memorandum, showed the meaning to be an undertaking by the vendor that the soda should arrive, and that he would deliver it, if the *vessel* arrived safely. But all the judges were of opinion that there was a *double condition precedent*, and that the contract was to take effect only if the vessel arrived, *and* if on arrival the soda was on board.

*Johnson v.  
Macdonald.*

In *Gorriessen v. Perrin*,<sup>3</sup> the sale was of "1170 bales of gambier, *now on passage from Singapore*, and *expected to arrive* in London, viz., per *Ravenscraig* 805 bales, per *Lady Agnes Duff* 365 bales." Both vessels arrived with the

*Gorriessen v.  
Perrin.*

<sup>1</sup> Ry. & M. 406.

<sup>2</sup> 9 M. & W. 600.

<sup>3</sup> 27 L. J., C. P. 29; 2 C. B., N. S. 681.



Fischel v.  
Scott.

specified number of *packages*, but it was proven that the contents were far short of the agreed number of *bales*, the latter word meaning in the trade a compressed package of two hundred weight. There was also on board the vessels a quantity of gambier consigned to other parties, sufficient to make up the whole quantity sold. The plaintiff who had bought the goods claimed in two counts: the first, on the theory that the words of the contract imported a *warranty* that there were 1170 *bales* actually on the passage: the second count, on the theory that even if it was a double condition precedent that the vessels should arrive with that quantity on board, the condition had been fulfilled, although part of the goods belonged to third persons and not to the vendor. The Court held, on the first count, that the language of the contract was plainly an absolute assurance, a warranty that the goods were on the passage. On the second point, which was not necessary to the decision, the Court, reviewing *Fischel v. Scott*,<sup>1</sup> distinguished it from the case before them. In that case a party sold oil expected to arrive, and which did arrive, but he had supposed it would come consigned to him, whereas it turned out that it had been consigned to some one else,—and inasmuch as he had intended and contracted to sell the very oil which arrived, he must bear the consequences, and the Court could not add to the contract a further condition, viz., that the goods on arrival should prove to be his: a very different thing from saying that when a man sells his own specific goods contingent on their arrival, and they do not arrive, the arrival of other similar goods, with which he never affected to deal, shall operate to fix him with the same consequences as if his own goods had arrived.<sup>2</sup>

Vernede v.  
Weber.

In *Vernede v. Weber*,<sup>3</sup> the contract was for the sale of “the cargo of 400 tons, provided the same be shipped for seller’s account, more or less, *Aracan Necrensie rice*, \* \* \*

<sup>1</sup> 15 C. B. 69.

<sup>2</sup> 1 H. & N. 11; 25 L. J., Ex. 326.

<sup>3</sup> See, on this point, Lord Ellenborough’s remarks in *Hayward v. Scougall*, 2 Camp. 56.

See *Simond v. Braddon*, 2 C. B., N. S. 324; 26 L. J., C. P. 198.

per British vessel *Minna*, \* \* \* at 11s. 6d. per cwt. for *Necrensie*, or at 11s. for *Larong*, the latter quality not to exceed 50 tons, or else at the option of buyers to reject any excess, &c." By the pleadings it appeared that the vessel arrived without any Aracan *Necrensie* rice at all, but with 285 tons of *Larong* rice, and 159 tons of *Latoorie* rice. The buyer sued for delivery of this cargo. It was held by the Court, first, that the contract did not contain a warranty that any particular rice should be put on board, but that the sale was conditional on such a cargo as was described being shipped; secondly, that the purchaser was not entitled to the entire cargo that arrived, because no *Latoorie* rice had been sold, no price was fixed for that quality, and the parties plainly intended to fix their own price for what was sold, and not to leave it for a jury to determine; and *thirdly*, though with some hesitation,<sup>1</sup> that the buyer had no right to the *Larong* rice, because the contract was entire: it contemplated the sale of a whole cargo of *Necrensie* rice; the *Larong* rice was to be a mere subsidiary portion of the cargo which was described as one of *Necrensie* rice; that the vendor could not have compelled the buyer to take a cargo of which no part corresponded with the description in the contract, in which there was no *Necrensie* rice at all, and that he could not be bound to deliver what he could not have compelled the buyer to take, for the contract must bind both or neither.

In *Simond v. Braddon*,<sup>2</sup> the sale was "of the following cargo of Aracan rice, per *Severn*, Captain *Bryan*, now on her way to *Akyab* (where the cargo was to be taken on board), *via* *Australia*. The cargo to consist of fair average *Nacrenzie* rice, the price of which is to be 11s. 6d. per cwt., with a fair allowance for *Larong* or any other inferior description of rice (if any); but the seller engages to deliver what is shipped on his account, and in conformity with his invoice,

*Simond v. Braddon.*

<sup>1</sup> This third point, notwithstanding the expression of hesitation by the learned judge who delivered the opinion, seems to rest on grounds

quite as solid and indisputable as the two preceding.

<sup>2</sup> 2 C. B., N. S. 824; 26 L. J., C. P. 198.

&c." The word "only" was improperly inserted before the word "engages," after the sold note was signed, and was not in the bought note. This was held to be a *warranty* by the defendant to ship a cargo of fair average Nacrenzie rice, and he was held liable for a breach of it, the cargo proving to be Nacrenzie rice of inferior quality.

Hale v. Rawson.

In *Hale v. Rawson*,<sup>1</sup> the declaration alleged an agreement by the defendant to sell to the plaintiff 50 cases of East India tallow, "to be paid for *in fourteen days after the landing thereof*, to be delivered by the defendant to the plaintiff, *on safe arrival of a certain ship* or vessel called the *Countess of Elgin*, then alleged to be on her passage from Calcutta to London;" that the sale was by sample, that the vessel had arrived, &c., &c., and that the defendant refused to deliver. Plea, that neither the tallow nor any part thereof arrived by the *Countess of Elgin*, whereby, &c. Demurrer and joinder. Held, that the contract for the sale was conditional on the arrival of the *vessel* only, notwithstanding the stipulation for payment after the landing of the tallow. In this case the language of the contract plainly imported an assurance or warranty that the tallow was on board the ship.

Result of the decisions in sales "to arrive."

It appears from this review of the decisions that contracts of this character may be classified as follows:—

*First*.—Where the language is that goods are sold "*on arrival* per ship A. or ex ship A.," or "*to arrive* per ship A. or ex ship A." (for these two expressions mean precisely the same thing),<sup>2</sup> it imports a *double condition precedent*, viz., that the ship named shall arrive, and that the goods sold shall be on board on her arrival.

*Secondly*.—Where the language asserts the goods to be on board of the vessel named, as "1170 bales *now on passage*, and expected to arrive per ship A.," or other terms of like import, there is a *warranty* that the goods are on board, and a *single condition precedent*, to wit, the arrival of the vessel.

*Thirdly*.—The condition precedent that the goods shall

<sup>1</sup> 4 C B., N. S. 85; 27 L. J., C. P. 189.

<sup>2</sup> *Per* Parke, B., in *Johnson v. McDonald*, 9 M. & W. 600—604.

arrive by the vessel will not be fulfilled by the arrival of goods answering the description of those sold, but not consigned to the vendor, and with which he did not affect to deal; but *semble*, the condition will be fulfilled if the goods which arrive are the same that the vendor intended to sell, in the expectation, which turns out to be unfounded, that they would be consigned to him.

*Fourthly.*—Where the sale describes the expected cargo to be of a particular description, as “400 tons *Aracan Necrensie* rice,” and the cargo turns out on arrival to be rice of a different description,<sup>1</sup> the condition precedent is not fulfilled, and neither party is bound by the bargain.

In a recent case<sup>2</sup> an attempt was made to convert a stipulation introduced in the vendor's favour into a condition precedent which he was bound to fulfil. A sale was made of cotton, “to arrive in Liverpool,” and a clause was inserted: “*The cotton to be taken from the quay: customary allowance of tare and draft, and the invoice to be dated from date of delivery of last bale.*” This was construed to be a stipulation *against* the buyer, not a condition in his *favour*; the purpose being probably to save warehouse charges, as it was shown that by the dock regulations in Liverpool, goods must be removed from the quay within twenty-four hours, in default whereof they are removed and warehoused by the dock authorities.

Neill v. Whitworth.

In sales of goods “to arrive,” it is quite a usual condition that the vendor shall give notice of the name of the ship on which the goods are expected as soon as it becomes known to him, and a strict compliance with this promise is a condition precedent to his right to enforce the contract.

Vendor to give notice in sales “to arrive.”

In *Buck v. Spence*,<sup>3</sup> decided in 1815, the seller agreed to sell certain flax, to be shipped from St. Petersburg, “and as soon as he knows the name of the vessel in which the flax will be shipped, he is to mention it to the buyer.” The vendor received the advice on the 12th September, in Lon-

Buck v. Spence.

<sup>1</sup> See *post*, Part 2, Ch. 1, Warranty, for the effect of a description of the thing sold.

<sup>2</sup> *Neill v. Whitworth*, 18 C. B., N. S. 435; 34 L. J., C. P. 155.

<sup>3</sup> 4 Camp. 329.

don, and did not communicate it to the defendant, who resided at Hull, till the 20th. The vessel arrived in October, and the defendant refused to accept the flax. Held, by Gibbs, C. J., that this was a condition precedent, that it had not been complied with, and that the question whether or not the communication made eight days after receiving the information was a compliance with the condition was one of law, not of fact. The plaintiff was therefore nonsuited.

*Graves v. Legg.*

This point seems not to have occurred again until 1854, when it was carefully considered as a new question, and determined in the same way, in the Exchequer, in *Graves v. Legg*,<sup>1</sup> the decision of Gibbs, C. J., in *Buck v. Spence*, having escaped the notice of the counsel and the Court, as no reference is made to it in the report. In this case, after the decision on the demurrer to the above effect, there was a trial on the merits, in which it was proven that the vessel was named to the buyer's broker, who had made the contract, in Liverpool; and that by the usage of that market, such notice to the broker was equivalent to notice to his principal, and the Court of Exchequer, as well as the Exchequer Chamber, held that this was a compliance with the condition.<sup>2</sup>

Rule in executory agreements, conditions concurrent.

The general rule in executory agreements for the sale of goods is that the obligation of the vendor to deliver, and that of the buyer to pay, are concurrent conditions in the nature of mutual conditions precedent, and that neither can enforce the contract against the other without showing performance,<sup>3</sup> or offer to perform, or averring readiness and willingness to perform his own promise.<sup>4</sup>

*Atkinson v. Smith.*

In *Atkinson v. Smith*,<sup>5</sup> there was a *mutual* agreement for cross sales, as follows: "Bought of A. & Co., about thirty

<sup>1</sup> 9 Exch. 709; 23 L. J., Ex. 228.

<sup>2</sup> 11 Ex. 642; 26 L. J., Ex. 316. See, also, *Gilkes v. Leonino*, 4 C. B., N. S. 485.

<sup>3</sup> *Morton v. Lamb*, 7 T. R. 125; *Waterhouse v. Skinner*, 2 B. & P. 447; *Rawson v. Johnson*, 1 East,

203; *Withers v. Reynolds*, 2 B. & Ad. 882; *Jackson v. Allaway*, 6 M. & G. 942.

<sup>4</sup> *Rawson v. Johnson*; *Jackson v. Allaway*, *supra*; *Boyd v. Lett*, 1 C. B. 222.

<sup>5</sup> 14 M. & W. 695.

packs of Cheviot fleeces, and agreed to take the under-mentioned noils (coarse woollen cloths, so called); also agreed to draw for 250*l.*, on account, at three months. 16 packs No. 5 noils, at 10½*d.*; 8 packs No. 4 noils, at 12*d.*" The defendant had bargained with the plaintiff for the purchase of the fleeces, and had agreed to sell him the noils. The noils rose in price, and the defendant refused to deliver them. Plaintiff brought action, averring *independent agreements*, but he was nonsuited, all the judges holding that he should have alleged his offer to deliver the fleeces, which was a condition precedent to his right to claim the noils.

Mutual agreement for cross sale.

In *Withers v. Reynolds*,<sup>1</sup> the defendant agreed to furnish plaintiff with wheat straw, sufficient for his use as stable-keeper, from 20th October, 1829, till 24th June, at the rate of three loads in a fortnight, at 33*s.* per load, and the plaintiff agreed "to pay to the said J. R., 33*s.* per load for each load of straw so delivered on his premises from this day till the 24th June, 1830." The plaintiff insisted that these were two independent agreements, that no time was fixed for payment, and that he could maintain his action against the defendant for not delivering, leaving the latter to his cross action for payment; but all the judges held, that the plaintiff's right was dependent on his readiness to pay for each load on delivery, and it being proven that he had expressly refused to execute the contract according to this interpretation of it, he was nonsuited.

*Withers v. Reynolds.*

In *Bankart v. Bowers*,<sup>2</sup> there was a written agreement, containing eight covenants, by which the plaintiff agreed to purchase certain land and coal mines from the defendant; and the latter, by the seventh of these covenants, agreed to purchase from the plaintiff all coal that he might require from time to time, at a fair market rate, and the action was for damages against the defendant for refusing to buy the coal, to which it was pleaded that the plaintiff had refused to buy the land; and on *demurrer* by plaintiff to this plea, held, that these were not independent agreements, but con-

*Bankart v. Bowers.*

<sup>1</sup> 2 B. & Ad. 882.

<sup>2</sup> L. R. 1, C. P. 484.

current stipulations, and there was judgment for the defendant on the demurrer.

Stipulations as to time.

In determining whether stipulations as to the *time* of performing a contract of sale are conditions precedent, the Court seeks simply to discover what the parties really intended, and if time appear, on a fair consideration of the language and the circumstances, to be of the essence of the contract, stipulations in regard to it will be held conditions precedent.

Howe v. Rennie.

In *Howe v. Rennie*,<sup>1</sup> the defendant agreed to buy from the plaintiff, 667 tons of iron, to be shipped from Sweden, *in about equal portions*, in each of the months of June, July, August, and September. The plaintiff shipped only twenty-one tons in June, which the defendant refused to accept as part compliance with the contract, and it was held, that the delivery at the time specified was a condition precedent, and that plaintiff could not on these facts maintain an action against the defendant for not accepting.

Jonassohn v. Young.

But in *Jonassohn v. Young*,<sup>2</sup> the agreement was for a supply of coal by the plaintiff to the defendant, as much as one steam vessel could convey in nine months, plying between Sunderland and London, the coals to be equal to a previous cargo supplied on trial, and the defendant to send the steamer for them. In an action for breach of this agreement, the defendant, among other defences, pleaded that the plaintiff had first broken the contract by detaining the vessel on divers occasions an unreasonable time, *far beyond that permitted by the contract*, before loading her, wherefore the defendant immediately, on notice of the plaintiff's default, refused to go on with the execution of the contract. A demurrer to this plea was held good. Plainly here the question of time was quite subordinate to the main purpose of the contract.

Sale by sample is conditional that buyer shall have a fair opportunity to

In a sale of goods by sample, it is a condition implied by law that the buyer shall have a fair opportunity of comparing the bulk with the sample, and an improper refusal by the

<sup>1</sup> 5 H. & N. 19; 29 L. J., Ex. 73.

<sup>2</sup> 4 B. & S. 296; 32 L. J., Q. B. 385.

vendor to allow this, is a breach which justifies the purchaser in rejecting the contract. In *Lorymer v. Smith*,<sup>1</sup> the purchaser asked to look at the bulk of 1400 bushels of wheat, which he had bought by sample, and on a refusal by the vendor to show it, said he would not take it. A few days afterwards the vendor communicated to the buyer his readiness then to show the bulk, and to make delivery on payment of the price. *Held*, by the King's Bench, that the buyer's request having been made at a proper and convenient time, and refused, he had the right to reject the sale. In this case a usage was shown, that the buyer had the right of inspection when demanded, but Abbott, C. J., said, that even without the usage, the law would give him that right.

compare the bulk.  
*Lorymer v. Smith.*

Other instances of sales, dependent on conditions precedent, are afforded by "sales on trial," or "on approval," and by the bargain known as "sale or return." In the former class of cases there is no sale till the approval is given, either expressly or by implication resulting from keeping the goods beyond the time allowed for trial. In the latter case the sale becomes absolute, and the property passes only after a reasonable time has elapsed, without the return of the goods.

Sales "on trial,"  
"on approval,"  
"sale or return."

In sales "on trial," the mere failure to return the goods within the time specified for trial, makes the sale absolute,<sup>2</sup> but the buyer is entitled to the full time agreed on for trial, as he is at liberty to change his mind during the whole term, and this right is not affected by his telling the vendor in the interval that the price does not suit him, if he still retains possession of the thing.<sup>3</sup>

Failure to return goods in reasonable time makes "sale on trial" absolute.

Where a party is entitled to make trial of goods, and the trial involves the consumption or destruction of what is tried, it is a question of fact for the jury whether the quantity consumed was more than necessary for trial, for if so, the sale will have become absolute by the approval implied

When trial involves consumption of what is tried.

<sup>1</sup> 1 B. & C. 1.

<sup>3</sup> *Ellis v. Mortimer*, 1 B. & P., N.

<sup>2</sup> *Humphries v. Carvalho*, 16 East, R. 257.



from thus accepting a part of the goods. This was ruled by Parke, B., in *Elliott v. Thomas*,<sup>1</sup> and approved by the Court in Banc, in that case, as well as by Martin and Bramwell, BB., in *Lucy v. Mouflet*.<sup>2</sup>

Question for jury, if goods used more than is necessary for trial.

*Okell v. Smith*.

In *Okell v. Smith*,<sup>3</sup> Bayley, J., also held, that where certain copper pans had been used five or six times by the defendant in trials, which showed them not to answer the purpose intended, it was a question for the jury whether the defendant had used them more than was necessary for a fair trial.

"Sale or return."

*Moss v. Sweet*.

The bargain called "sale or return" was explained by the Queen's Bench, in *Moss v. Sweet*,<sup>4</sup> to mean a sale with a right on the part of the buyer to return the goods at his option, within a reasonable time, and it was held in that case, that the property passes, and an action for goods sold and delivered will lie if the goods are not returned to the seller within a reasonable time. In this case, *Iley v. Frankenstein*<sup>5</sup> was overruled, and *Lyons v. Barnes*<sup>6</sup> was said by Patteson, J., not to be "very good law," as had been previously intimated by Lord Abinger, C. B., in *Bianchi v. Nash*.<sup>7</sup>

*Iley v. Frankenstein* overruled.

*Lyons v. Barnes* disapproved.

Sale by description involves condition precedent.

Description is not *warranty*, but *condition*.

When the vendor sells an article by a particular description, it is a condition precedent to his right of action, that the thing which he offers to deliver, or has delivered, should answer the description. Lord Abinger protested against the confusion which arises from the prevalent habit of treating such cases as warranty, saying: "A good deal of confusion has arisen in many of the cases upon this subject, from the unfortunate use made of the word warranty. Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and though part of the contract, *collateral to the express object of it*. But in

<sup>1</sup> 3 M. & W. 170.

<sup>2</sup> 5 H. & N. 229; 29 L. J., Ex. 110.

<sup>3</sup> 1 Starkie, 107; and see *Street v. Blay*, 2 B. & Ad. 456.

<sup>4</sup> 16 Q. B. 493; 20 L. J., Q. B. 167. See *Swain v. Shepherd*, 1 M. & Rob.

223.

<sup>5</sup> 8 Scott, N. R. 839.

<sup>6</sup> 2 Starkie, 39.

<sup>7</sup> 1 M. & W. 546; and see *Bailey v. Goldsmith, Peake*, 56, 78; *Beverley v. Lincoln Gaslight Company*, 6 Ad. & E. 829.

many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil: as if a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas, the *contract* is to sell peas, and if he sell him anything else in their stead, it is a non-performance of it."<sup>1</sup> There can be no doubt of the correctness of the distinction here pointed out. If the sale is of a described article, the tender of an article answering the description is a condition precedent to the purchaser's liability, and if this condition be not performed, the purchaser is entitled to reject the article, or if he has paid for it, to recover the price as money had and received for his use; whereas, in case of warranty, the rules are very different, as will appear *post*, (Book V., Part 2, Ch. 2). There is no controversy as to this principle, and a few only of the more modern cases need be referred to, as affording illustrations of its application.

In *Nichol v. Godts*,<sup>2</sup> the sale was of "foreign refined rape oil, warranted only equal to samples." *The oil tendered corresponded with sample*, but the jury found that it was not "foreign refined rape oil." Held, that a sale by sample has reference only to *quality*; that the purchaser was not bound to receive what was not the article described, Pollock, C. B., saying, in answer to the argument that there was no warranty the oil should be refined rape oil: "It is not exactly a warranty, but if a man contracts to buy a thing, he ought not to have something else delivered to him."

*Nichol v.  
Godts.*

In *Shepherd v. Kaine*,<sup>3</sup> a vessel was advertised for sale as a "copper-fastened vessel," on the terms that she was to be "taken with all faults, without allowance for any defects what-

*Shepherd v.  
Kaine.*

<sup>1</sup> In *Chantor v. Hopkins*, 4 M. & W. 399.

<sup>2</sup> 5 B. & Ald. 240; and see *Kain v. Old*, 2 B. & C. 627.

<sup>3</sup> 10 Ex. 191; 23 L. J., Ex. 314.

soever." She was only partially copper-fastened, and would not be called in the trade a copper-fastened vessel. Held, that the vendor was liable for the misdescription, the Court saying that the words "with all faults," meant all faults which the vessel might have "consistently with its being the thing described," *i.e.*, a copper-fastened vessel. But in the very similar case of *Taylor v. Bullen*,<sup>1</sup> where the vessel was described as "teak-built," and the terms were "with all faults, \* \* \* and without any allowance for any defect or error whatever," it was held that the addition of the word "error" distinguished the case from *Shepherd v. Kaine*, and covered an unintentional misdescription, so as to shield the vendor, in the absence of fraud, from any responsibility for error in describing the vessel as teak-built.

*Taylor v.  
Bullen.*

In *Allan v. Lake*,<sup>2</sup> it was held that a sale of turnip-seed as "Skirving's Swedes," was not a sale with warranty of quality, but with a description of the article, and that the contract was not satisfied by the tender of any other seed than "Skirving's Swedes."

*Allan v. Lake.*

In *Wieler v. Schilizzi*,<sup>3</sup> the sale was of "Calcutta linseed, *tale quale*," and the article delivered contained an admixture of 15 per cent. of mustard, but it came from Calcutta, and there was a conflict of testimony. It was left to the jury to say whether the article had lost "its distinctive character," so as not to be saleable as Calcutta linseed. The jury so found, and the purchaser succeeded in his action. This was an action for breach of warranty, but although maintained as such, it is plain that on principle, the purchaser might have rejected the contract *in toto*.

*Wieler v. Schi-  
lizzi.*

In *Hopkins v. Hitchcock*,<sup>4</sup> the plaintiffs, H. & Co., had succeeded to the firm of S. & H., iron manufacturers, who were in the habit of stamping their iron "S. & H." with a crown. The defendants applied to purchase "S. & H." iron through a broker, and were informed that all iron made by the firm was now marked "H. & Co." The defendants

*Hopkins v.  
Hitchcock.*

<sup>1</sup> 5 Ex. 779.

<sup>2</sup> 18 Q. B. 560.

<sup>3</sup> 17 C. B. 619; 25 L. J., C. P. 89.

<sup>4</sup> 14 C. B., N. S. 65; 32 L. J., C. P. 154.

then ordered 67 tons of the iron, and the broker made the bought note for "67 tons S. & H. Crown common bars." The iron on delivery was marked H. & Co., and rejected by the defendants. The jury found the variation in the brand to be of no consequence, and gave a verdict for the plaintiffs. On motion for new trial, the Court refused to set aside the verdict, holding that under the special facts and circumstances of the case, and the jury having negatived that the mark was of any consequence, the plaintiffs had delivered the goods in conformity with the description in the contract.

In *Bannerman v. White*,<sup>1</sup> the sale was of hops, and there was a known objectionable practice of using sulphur in their growth, and both parties knew that the merchants had notified the growers of their objection to buy such hops. At the time of the sale the buyers inquired, before asking the price, if sulphur had been used, and the seller answered, No. The sale was then made by sample, and the delivery corresponded, and the buyer took possession, but afterwards rejected the contract on discovering that sulphur had been used. It was uncontroverted that the defendant would not have bought if the fact had been known to him, and that he could not sell the hops as they were, in his usual dealings with his customers. The jury found that the misrepresentation as to the use of sulphur was not wilful, thus repelling fraud, but that "the affirmation that no sulphur had been used was intended between the parties as a part of the contract of sale, and a warranty by the plaintiff." Erle, C. J., in delivering the decision of the Court, said that in deciding the effect of this finding, "We avoid the term 'warranty,' because it is used in two senses, and the term 'condition,' because the question is, whether that term is applicable. Then the effect is that the defendant required and the plaintiff gave his undertaking that no sulphur had been used. This undertaking was a preliminary stipulation, and if it had not been given, the defendant would not have gone

*Bannerman v.  
White.*

<sup>1</sup> 10 C. B., N. S. 844 ; 31 L. J., C. P. 28.

on with the treaty, which resulted in the sale. In this sense, it was the condition upon which the defendant contracted." Held, that plaintiff had not fulfilled the condition, and could not enforce the sale.

Josling v.  
Kingsford.

In *Josling v. Kingsford*,<sup>1</sup> the sale was of oxalic acid, and it had been examined and approved, and a great part of it used by the purchaser, and the vendor did not warrant quality. On analysis, it was afterwards found to be chemically impure, from adulteration with sulphate of magnesia, a defect not visible to the naked eye, nor likely to be discovered even by experienced persons. There were two counts in the declaration, one for breach of contract to deliver "oxalic acid," the other for breach of warranty that the goods delivered were "oxalic acid." Erle, C. J., told the jury that there was no evidence of a warranty, and that the question was whether the article delivered came under the denomination of oxalic acid in commercial language. The jury found for the plaintiff. Held, in Banc, that the direction was right.

Azéma v. Casella.

In the recent case of *Azéma v. Casella*,<sup>2</sup> the plaintiff sold cotton to the defendant through a broker, by what was known as a certified London contract, in the following words:—"Sold, by order and for account of Messrs. J. C. Azéma and Co., to Messrs. A. Casella and Co., the following cotton, viz.,  $\frac{D}{C}$  128 bales at 25*d.* per pound, expected to arrive in London per Cheviot, from Madras. The cotton *guaranteed equal to sealed sample in our possession, &c.*" The sealed sample was a sample of "Long-staple Salem cotton;" the cotton turned out, when landed, to be not in accordance with the sample, being "Western Madras." The contract contained a clause: "Should the quality prove inferior to the guarantee, a fair allowance to be made." It was admitted that Western Madras cotton is inferior to Long-staple Salem, and *requires machinery for its manufacture different from that used for the latter.* Held, that this was not a case of inferiority of

<sup>1</sup> 13 C. B., N. S. 447; 32 L. J., C. P. 94.

<sup>2</sup> L. R. 2, C. P. 431; 36 L. J., C. P. 124.

quality, but difference of *kind*; that there was a condition precedent, and not simply a warranty, and that the defendant was not bound to accept.

On error, to the Exchequer Chamber, the judgment of the Court below was unanimously confirmed, without hearing the defendant's counsel.

Lord Tenterden held, in two cases<sup>1</sup> at *Nisi Prius*, that a vendor could not recover for books or maps sold by a description or prospectus, if there were any material difference between the book or map furnished and that described in the prospectus.

Books and maps sold according to prospectus.

Under this head may also properly be included the class of cases in which it has been held that the vendor who sells bills of exchange, notes, share certificates, and other securities is bound, not by the collateral contract of warranty, but by the principal contract itself, to deliver as a condition precedent that which is genuine, not that which is false, counterfeit, or not marketable by the name or denomination used in describing it.

Sale of securities implied condition that they are genuine.

Thus, in *Jones v. Ryde*,<sup>2</sup> it was held that the vendor of a forged navy-bill was bound to return the money received for it.

*Jones v. Ryde.*

In *Young v. Cole*,<sup>3</sup> the plaintiff, a stock-broker, was employed by the defendant to sell for him four Guatemala bonds, in April, 1836, and it was shown that in 1829, unstamped Guatemala bonds had been repudiated by the government of that state, and had ever since been not a marketable commodity on the Stock Exchange. The defendant received the price on the delivery of unstamped bonds, both parties being ignorant that a stamp was necessary. The unstamped bonds were valueless. Held, that the defendant was bound to restore the price received; Tindal, C. J., saying that the contract was for real Guatemala bonds, and that the case was just as if the contract had been to sell foreign coin, and the defendant had delivered counters in-

*Young v. Cole.*

<sup>1</sup> *Paton v. Duncan*, 3 C. & P. 336, and *Teesdale v. Anderson*, 4 C. & P. 198.

<sup>2</sup> 5 Taunt. 488.

<sup>3</sup> 3 Bingh. N. C. 724.

stead. "It is not a question of warranty, but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value."

Westropp v.  
Solomon.

In *Westropp v. Solomon*,<sup>1</sup> the same rule was recognised, and it was also held that in such cases, nothing further was recoverable from the vendor than the purchase-money he had received, and that he was not responsible for the value of genuine shares.

Gompertz v.  
Bartlett.

In *Gompertz v. Bartlett*,<sup>2</sup> the sale was of a foreign bill of exchange: it turned out that the bill was not a foreign bill, and therefore worthless, because unstamped. The purchaser was held entitled to recover back the price, because the thing sold was not of the kind described in the sale. But in *Pooley v. Brown*,<sup>3</sup> where the plaintiff bought foreign bills from the defendant, and by the Stamp Act<sup>4</sup> it was the duty of the seller to cancel the stamp before he delivers, and of the buyer to see that this is done before he receives, and both parties neglected this duty, so that the buyer was unable to recover on the bills, Erle, C. J., and Keating, J., were of opinion that the buyer, who was equally in fault with the vendor under the law, could not avail himself of the principle laid down in *Gompertz v. Bartlett*; but Williams, J., dissented on that point, though the Court was unanimous in holding that the purchaser had by his own laches and delay lost all right to complain, under the special circumstances.

Gurney v.  
Womersley.

In *Gurney v. Womersley*,<sup>5</sup> a bill of exchange was sold to the plaintiffs, on which all the signatures were forged except that of the last endorser, who had forged all the preceding names, and Bramwell, for defendant, made a strenuous effort to distinguish the case on the ground that in *Jones v. Ryde*, and *Young v. Cole*, *supra*, the thing sold was *entirely* false and valueless; whereas in this case the last indorser's signature was genuine, and the bill therefore of *some* value.

<sup>1</sup> 8 C. B. 345.

<sup>2</sup> 2 E. & B. 849; 23 L. J., Q. B. 65.

<sup>3</sup> 11 C. B., N. S. 566; 31 L. J., C. P. 134.

<sup>4</sup> 17 & 18 Vict. c. 83, s. 5.

<sup>5</sup> 4 E. & B. 133; 24 L. J., Q. B. 46; and see, also, *Woodland v. Fear*, 7 E. & B. 519; 26 L. J., Q. B. 202.

But it was held that a party offering a bill for sale, offers in effect an instrument drawn, accepted, and indorsed according to its purport.

But it is a question for the jury, whether the thing delivered be what was really intended by both parties as the subject-matter of the sale, although not very accurately described.

Question of fact whether thing delivered is really what was intended by both parties.

Thus, in *Mitchell v. Newhall*,<sup>1</sup> the sale was of "fifty shares," in a foreign railway company. The buyer refused to receive from the plaintiff, his stock-broker, delivery of a *letter of allotment* for fifty shares. Held, that he was bound by his bargain, proof having been made to the satisfaction of the jury, that no shares in the railway had yet been issued, and that letters of allotment were commonly bought and sold as shares in this company on the Stock Exchange. And in *Lamert v. Heath*,<sup>2</sup> it appeared that the defendant, a stock-broker, had bought for the plaintiff scrip certificates of shares in the Kentish Coast Railway Company. These scrip certificates were signed by the secretary, and issued from the offices of the company, and were the subject of sale and purchase in the market for several months, when the scheme was abandoned, and the company repudiated the scrip as not genuine, on the allegation that it was issued without authority. The plaintiff then sought to recover back the price from the stock-broker, on the ground that the latter had not delivered genuine scrip. But the Court, without hearing argument on the other side, held the buyer bound by his bargain, the Court saying: "If this was the only Kentish Coast Railway scrip in the market, \* \* \* and one person chooses to sell, and the other to buy that, then the latter has got all that he contracted to buy."

*Mitchell v. Newhall.*

*Lamert v. Heath.*

In *Lamond v. Duvall*<sup>3</sup> it was held that a sale was conditional, where the vendor had reserved power to resell on the

Reservation of power to re-sell on buyer's de-

<sup>1</sup> 15 M. & W. 308.

<sup>2</sup> 15 M. & W. 487.

<sup>3</sup> 9 Q. B. 1030.



fault renders  
sale condi-  
tional.

buyer's default; that a resale on such default was a rescission of the original sale; and that the vendor could not, therefore, maintain *assumpsit* on it, his proper remedy being an action for damages for the loss and expenses of the resale.

## PART II.

### VENDOR'S DUTIES.

#### CHAPTER I.

##### WARRANTY.

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## SECTION I.—EXPRESS WARRANTY.

What is a warranty.

A WARRANTY in a sale of goods is not one of the essential elements of the contract, for a sale is none the less complete and perfect in the absence of a warranty. But it is a collateral undertaking, *forming part of the contract* by the agreement of the parties express or implied.<sup>1</sup> It follows, therefore, that antecedent representations made by the vendor as an *inducement* to the buyer, but not forming part of the contract when concluded, are not warranties. It is not, indeed, necessary that the representation, in order to constitute a warranty, should be simultaneous with the conclusion of the bargain, but only that it should be made during the course of the dealing, which leads to the bargain, and should then enter into the bargain as part of it. Of the general principle, a good illustration is given in *Hopkins v. Tanqueray*,<sup>2</sup> where the plaintiff bought a horse, sold at auction, without warranty. On the day before the sale, while the plaintiff was examining the horse at Tattersall's stables, the defendant entered, and they being acquainted with each other, he said to the plaintiff: "You have nothing to look for: I assure you he is perfectly sound in every respect;" to which the plaintiff replied: "If you say so, I am satisfied," and desisted from the examination. The horse turned out to be unsound, but the vendor did not know it when he made the representation, so that there was no pretence for

*Hopkins v. Tanqueray.*

<sup>1</sup> *Foster v. Smith*, 18 C. B. 156; <sup>2</sup> 15 C. B. 130; 23 L. J., C. P. 162; *Mondel v. Steel*, 8 M. & W. 858; and see *per Martin, B.*, in *Stucley Street v. Blay*, 2 B. & Ad. 456; *v. Bailey*, 1 H. & C. 405; 31 L. J., *Chanter v. Hopkins*, 4 M. & W. 399. Ex. 483.

a charge of fraud ; which was indeed disclaimed by the buyer, who stood simply on the point that the conversation was a private warranty to *him*, although the auctioneer put up the horse without warranty. But all the judges held, that this antecedent representation was *no part of the contract* which was made by the buyer when he bid for the horse ; that it was a representation of the seller's opinion and judgment about the horse, for which he could not be made responsible, if he was honest when expressing it.

It also follows from what precedes, that a warranty given after a sale has been made, is void, unless some new consideration be given for the warranty. The consideration already given is exhausted by the transfer of the property in the goods without a warranty, and there is nothing to support the subsequent agreement to warrant, unless a new consideration be given.<sup>1</sup>

Warranty after sale requires new consideration.

It further follows, and such is the general rule of law, that no warranty of the *quality* of a chattel is implied from the mere fact of sale. The rule in such cases is *caveat emptor*, by which is meant that when the buyer has required no warranty, he takes the risk of quality upon himself,<sup>2</sup> and has no remedy if he chose to rely on the bare representation of the vendor, unless indeed he can show that representation to be fraudulent. To this rule there are many exceptions.<sup>3</sup>

No warranty of quality implied by mere fact of sale.

*Caveat emptor.*

In regard to warranty of *title*, inasmuch as it is an essential element of the contract of sale that there should be a transfer of the absolute or general property in the thing from the seller to the buyer, it would seem naturally to follow that by the very act of selling the chattel, the vendor undertakes to transfer the *property* in the thing, and thus warrants his title or ability to sell, and it is believed

Many exceptions to this rule.

Warranty of title.

<sup>1</sup> *Roscorla v. Thomas*, 3 Q. B. 234.

<sup>2</sup> *Springwell v. Allen*, Aleyn. 91, and 2 East, 448 n. ; *Parkinson v. Lee*, 2 East, 314 ; *Williamson v. Allison*, 2 East, 446 ; *Earley v. Garrett*, 9 B. & C. 902 ; *Morley v. Attenborough*, 3

Ex. 500 ; *Ormrod v. Huth*, 14 M. & W. 664 ; *Hall v. Conder*, 2 C. B., N. S. 22 ; 26 L. J., C. P. 138 and 288 ; *Hopkins v. Tanqueray*, 15 C. B. 130 ; 23 L. J., C. P. 162.

<sup>3</sup> *Post*, Warranty of Quality.

that such is the true rule of law, but the question is still open to doubt, as will presently be shown.

No special form of words needed to create warranty.

No special form of words is necessary to create a warranty. It is nearly two hundred years since Lord Holt first settled the rule, in *Cross v. Gardner*,<sup>1</sup> and *Medina v. Stoughton*,<sup>2</sup> which Buller, J., in 1789, laid down in the opinion given by him in the famous leading case of *Pasley v. Freeman*,<sup>3</sup> as follows: "It was rightly held by Holt, C. J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appear in evidence to have been so intended."<sup>4</sup>

Test for deciding whether representation amounts to warranty.

And in determining whether it was so intended, a decisive test is whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion, and to exercise his judgment. In the former case there is a warranty, in the latter, not.<sup>5</sup>

Whether warranty was intended, fact for the jury.

This intention is a question of fact for the jury, to be inferred from the nature of the sale and the circumstances of the particular case, as will appear *passim* in the authorities to be reviewed.<sup>6</sup>

Interpretation of express warranties.

In relation to express warranties, the rules for interpreting them do not differ from those applied to other contracts. The intention of the parties is sought and carried into effect, and in some cases even where the alleged warranty was expressed in writing, it has been left to the jury to say

<sup>1</sup> Carthew, 90; 3 Mod. 261; 1 Show. 68.

<sup>2</sup> 1 Lord Raymond, 593; Salk. 220.

<sup>3</sup> 3 T. R. at p. 57; 2 Sm. L. C. 71.

<sup>4</sup> See, also, *Power v. Barham*, 4 A. & E. 473; *Shepherd v. Kain*, 5 B. & A. 240; *Freeman v. Baker*, 5 B. & Ad. 797; *Hopkins v. Tanqueray*, 15 C. B. 180; 23 L. J., C. P. 162; *Taylor v. Bullen*, 6 Ex. 779; *Powell v. Horton*, 2 Bing. N. C. 668; *Allen v.*

*Lake*, 18 Q. B. 560; *Simond v. Brad- don*, 2 C. B., N. S. 324; 26 L. J., C. P. 198; *Hopkins v. Hitchcock*, 14 C. B., N. S. 65; 32 L. J., C. P. 154.

<sup>5</sup> *Per* Buller, J., in *Pasley v. Freeman*, 3 T. R. 51; *Powell v. Barham*, 4 A. & E. 473; *Jendwine v. Slade*, 2 Esp. 572; and see *per* Bramwell, B., in *Stucley v. Bailey*, *infra*; *Carter v. Crick*, 4 H. & N. 412; 28 L. J., Ex. 238.

<sup>6</sup> See, specially, *Stucley v. Bailey*, 1 H. & C. 405; 31 L. J., Ex. 483.

whether the intention of the parties was that the representation or affirmation should constitute a warranty or not, for *simplex commendatio non obligat*.

In *Jendwine v. Slade*,<sup>1</sup> two pictures were sold at auction by a catalogue, in which one was said to be a sea-piece by Claude Lorraine, and the other a fair by Teniers. Lord Kenyon held this no warranty that the pictures were genuine works of these masters, but merely an expression of opinion by the vendor. But in *Power v. Barham*,<sup>2</sup> where the vendor sold by a bill of parcels, "four pictures, views in Venice, Canaletti," it was held proper that the jury should decide whether the defendant meant to warrant that the pictures were the genuine works of Canaletti. Lord Denman, C. J., distinguished the case from *Jendwine v. Slade*, by the suggestion that Canaletti<sup>3</sup> was a comparatively modern painter, of whose works it would be possible to make proof as a matter of *fact*, but that in the case of very old painters the assertion was necessarily a matter of opinion.

*Jendwine v. Slade.*

*Power v. Barham.*

In a sale of "a horse, five years old; has been constantly driven in the plough, warranted;" the warranty was held to refer to soundness only<sup>4</sup>; and where the sale was in these words: "Received £10 for a grey four-year-old colt, warranted sound in every respect," the warranty was also confined to soundness.<sup>5</sup> And in still another case, where the sale was thus worded, "Received £100 for a bay gelding got by Cheshire Cheese, warranted sound," it was held that there was no warranty that the horse was of the breed named.<sup>6</sup>

Examples of construction of written warranties.

In *Lomi v. Tucker*,<sup>7</sup> the sale was of two pictures, said by the plaintiff to be "a couple of Poussins;" and it was left by Lord Tenterden to the jury, to say whether the defendant

*Lomi v. Tucker.*

<sup>1</sup> 2 Esp. 572.

<sup>2</sup> 4 A. & E. 473.

<sup>3</sup> Canaletti died in 1768; Claude Lorraine in 1682; Teniers the younger in 1694.

<sup>4</sup> *Richardson v. Brown*, 1 Bing. 344.

<sup>5</sup> *Budd v. Fairmaner*, 8 Bing. 48.

<sup>6</sup> *Dickenson v. Gupp*, quoted at p. 50 in *Budd v. Fairmaner*, 8 Bing. 48.

<sup>7</sup> 4 Car. & P. 15. See, also, *De Sewhanberg v. Buchanan*, 5 Car. & P. 343.

bought the pictures, believing them, from the plaintiff's representation, to be genuine; for if so, he was not bound to take them unless genuine.

**Wood v. Smith.** In *Wood v. Smith*,<sup>1</sup> the action was *assumpsit*, and the proof was that the defendant in reply to the plaintiff's question had said that a mare sold, was "sound to the best of his knowledge," and on further question, had refused to warrant, saying, "I never warrant; I would not even warrant myself." The mare was unsound, and the defendant knew it. Gurney, for, defendant, insisted that the action should have been *tort*, for there was an express refusal to warrant. But Lord Tenterden, at the trial, and the Court in Banco, afterwards held, that on these facts there was a *qualified warranty* that the mare was sound to the best of the defendant's knowledge, and that the action was therefore well brought in *assumpsit*.

**Powell v. Horton.** In *Powell v. Horton*,<sup>2</sup> the sale was "of mess pork, of Scott and Co.," and the defendant attempted to evade his responsibility by showing that the pork delivered by him was really mess pork, *consigned* to him by Scott and Co.; but proof was received to show that those words meant in the trade, mess pork *manufactured* by Scott and Co., which was worth more in the market than the article delivered by the defendant, and the Court held the defendant bound by a warranty that the pork was of that manufacture.

**Yates v. Pym.** And in *Yates v. Pym*,<sup>3</sup> the Court refused to admit parol evidence of the usage of trade to qualify an express warranty. The sale was of "prime singed bacon;" and evidence was offered, that as bacon is an article necessarily deteriorating from its first manufacture, a usage of the trade was established, that a certain degree of deterioration, called average taint, was allowed, before the article ceases to become "prime bacon," but the evidence was held rightly rejected.

**Bywater v. Richardson.** In *Bywater v. Richardson*,<sup>4</sup> a notice that a warranty was to remain in force only till twelve o'clock next day was con-

<sup>1</sup> 5 M. & R. 124.

<sup>2</sup> 2 Bing. N. C. 668.

<sup>3</sup> 6 Taunt. 446.

<sup>4</sup> 1 Ad. & E. 508.

strued to mean that the vendor was responsible only for such defects as might be pointed out before that hour; and in *Chapman v. Gwyther*,<sup>1</sup> a sale of a horse, "warranted sound for one month," was also construed as a limitation of the vendor's responsibility to such faults as were pointed out within the month, so that he was held not liable for a defect which existed at the time of the sale, but was not discovered till more than a month had elapsed.

*Chapman v.  
Gwyther.*

A general warranty does not usually extend to defects apparent on simple inspection, requiring no skill to discover them, nor to defects known to the buyer. But the warranty may be so expressed as to protect the buyer against the consequences growing out of a patent defect.

General warranty does not extend to defects apparent on simple inspection.

In *Liddard v. Kain*,<sup>2</sup> the sale was of horses, known to the buyer to be affected, one with a cough, and the other with a swelled leg; but the vendor agreed to deliver the horses at the end of a fortnight, sound and free from blemish, and this warranty was held to include the defects above mentioned, although known to the purchaser.

*Liddard v.  
Kain.*

*Margetson v. Wright*,<sup>3</sup> which was twice tried, is instructive on this point. The sale was of a race-horse, which had broken down in training, was a crib-biter, and had a splint on the off fore-leg. The horse, sound in other respects, would have been worth 500*l.* if free from the defects named. He was sold by the defendant to the plaintiff, after disclosure of these defects, for 90*l.* The defendant refused to give a warranty that the horse would stand training, and refused to sign a warranty that the horse was "sound, wind and limb," without adding the words, "at this time." Six months afterwards the horse broke down in training, and Parke, J., told the jury that the express warranty rendered the defendant responsible for the consequences of the splint, though it was known to the purchaser: but that the addition of the words, "at this time," was intended to exclude a warranty that the horse would stand training. On motion for

*Margetson v.  
Wright.*

<sup>1</sup> L. R. 1, Q. B. 464; 35 L. J., Q. 2 T. R. 745.

B. 142. See *Mesnard v. Aldridge*, 3

<sup>2</sup> 2 Bing. 183.

Esp. 271; *Buchanan v. Parnshaw*,

<sup>3</sup> 7 Bing. 603; 8 Bing. 454



new trial, the first branch of this ruling was held erroneous, Tindal, C. J., saying: "The older books lay it down that defects apparent at the time of a bargain are not included in a warranty, however general, because they can form no subject of deceit or fraud, and originally the mode of proceeding on a warranty was by an action of deceit, grounded on a supposed fraud. There can, however, be no deceit where a defect is so manifest that both parties discuss it at the time; a party, therefore, who should buy a horse, knowing it to be blind in both eyes, could not sue on a general warranty of soundness. In the present case, the splint was known to both parties, and the learned judge left it to the jury to say whether the horse was fit for ordinary purposes. His direction would have been less subject to misapprehension if he had left them to consider whether the horse was at the time of the bargain sound, wind and limb, *saving those manifest defects contemplated by the parties.*"

On the new trial then ordered, the plaintiff proved to the satisfaction of the jury, that there were two kinds of splints, some of which cause lameness, and others do not, and that the splint in question did cause a subsequent lameness, and they found that the horse at the time of the sale, "had upon him the seeds of unsoundness arising from the splint." *Held*, that this result not being apparent at the time, and the buyer not being able to tell whether the splint was one that would cause lameness, was protected by the warranty that the horse was then sound.<sup>1</sup>

Tye v. Fynmore.

But in *Tye v. Fynmore*,<sup>2</sup> where the sale was of "fair merchantable sassafras wood," the purchaser refused to take the article, alleging that these words meant in the trade, the roots of the sassafras tree, but that the wood tendered by plaintiff was part of the timber of the tree, not worth more than one-sixth as much as the roots. In answer to this it was shown that a specimen of the wood sold was exhibited to the buyer before the sale, and that the buyer was a druggist, well skilled in the article. Lord Ellenborough

<sup>1</sup> See, also, *Butterfield v. Burroughs*, 1 Salk. 211; *Southern v. Howe*, 2 Rolle 5; 2 Bl. Com. 165-6.

<sup>2</sup> 3 Camp. 462.

said: "It is immaterial that the defendant is a druggist, and skilled in the nature of medicinal woods. He was not bound to exercise his skill, having an express undertaking from the vendor as to the quality of the commodity."

The meaning of the word "sound," when used in the sale of horses, has been the subject of several decisions, and it is settled that the interpretation of a warranty to that effect depends much on custom and usage, as well as upon the circumstances of the particular case. The rule was fully considered in *Kiddell v. Burnard*.<sup>1</sup> A verdict was given at Nisi Prius in favour of the plaintiff, who had purchased, with a warranty of soundness, some bullocks at a fair. The learned judge (Erskine, J.) told the jury that the plaintiff was bound to show that at the time of the sale the beasts had some disease, or the seeds of some disease in them which would render them unfit, or in some degree less fit, for the ordinary use to which they would be applied. On the motion for new trial, Parke, B., said: "The rule I laid down in *Coates v. Stevens*<sup>2</sup> is correctly reported, and I am there stated to have said: 'I have always considered that a man who buys a horse warranted sound, must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses. The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either does diminish the natural usefulness of the animal so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal, or if the horse has either from disease or accident undergone any alteration of structure, that either actually does at the time, or in its ordinary effects will diminish the natural usefulness of the horse, such horse is unsound. If the cough actually existed at the time of the sale as a disease, so as actually to diminish the natural usefulness of the horse at that time, and to make him less capable of immediate

Meaning of  
"soundness"  
in warranty of  
horses.

*Kiddell v.*  
*Burnard.*

<sup>1</sup> 9 M. & W. 668; and see *Holli-* J., Q. B. 9.  
*day v. Morgan*, 1 E. & E. 1; 28 L.

<sup>2</sup> 2 Moo. & Rob. 157.

work, he was then unsound; or if you think the cough, which, in fact, did afterwards diminish the usefulness of the horse, existed at all at the time of the sale, you will find for the plaintiff. I am not now delivering an opinion formed at the moment on a new subject: it is the result of a full previous consideration.' That is the rule I have always adopted and acted on in cases of unsoundness, although in so doing I differ from the contrary doctrine laid down by my brother Coleridge in *Bolden v. Brogden*."<sup>1</sup> All the judges, Alderson, Gurney, and Rolfe, BB., concurred in this exposition, the first-named saying: "The doctrine laid down by my brother Parke to-day, and in the case of *Coates v. Stevens*, is not new law: it is to be found recognised by Lord Ellenborough<sup>2</sup> and other judges in a series of cases.

*Bolden v. Brogden* overruled by *Kiddell v. Burnard*.

In *Bolden v. Brogden*,<sup>1</sup> which it is submitted was overruled in *Kiddell v. Burnard*, Coleridge, J., had told the jury that the question on such a warranty was whether the animal had upon him a disease calculated *permanently* to render him unfit for use, or *permanently* to diminish his usefulness.<sup>3</sup>

Defects which have been held to constitute unsoundness.

It may be convenient to state some of the defects which have been held to constitute unsoundness. Any *organic* defect, such as that a horse has been *nerved*;<sup>4</sup> bone-spavin in the hock;<sup>5</sup> ossification of the cartilages;<sup>6</sup> the navicular disease<sup>7</sup> and thick-wind<sup>8</sup> have been held to constitute unsoundness in horses, and goggles in sheep.<sup>9</sup> But roaring has been held not to be,<sup>10</sup> and in a later case to be,<sup>11</sup> unsoundness. Crib-biting<sup>12</sup> has been held to be not unsoundness, but to be covered by a warranty against vices.<sup>13</sup>

<sup>1</sup> 2 Moo. & Rob. 113.

<sup>2</sup> *Elton v. Brogden*, 4 Camp. 281; *Elton v. Jordan*, 1 Stark. 127.

<sup>3</sup> See, also, *Onalow v. Eames*, 2 Stark. 81; *Garment v. Barra*, 2 Esp. 673, which seem also to be overruled by *Kiddell v. Burnard*.

<sup>4</sup> *Best v. Osborne*, Ry. & Moo. 290.

<sup>5</sup> *Watson v. Denton*, 7 Car. & P. 85.

<sup>6</sup> *Simpson v. Potts*, Oliph. Law of Horses, 224.

<sup>7</sup> *Matthews v. Parker*, Oliph. Law

of Horses, 228; and *Bywater v. Richardson*, 1 Ad. & E. 598.

<sup>8</sup> *Atkinson v. Horridge*, Oliph. Law of Horses, 229.

<sup>9</sup> *Joliff v. Bandell*, Ryan & Moo. 136.

<sup>10</sup> *Bassett v. Collis*, 2 Camp. 523.

<sup>11</sup> *Onalow v. Eames*, 2 Stark. 81.

<sup>12</sup> *Brœnnenburgh v. Haycock*, Holt, N. P. 630.

<sup>13</sup> *Scholefield v. Robb*, 2 Mood. & Rob. 210.

Mere badness of shape that is likely to produce unsoundness, and which really does produce unsoundness, is not a breach of warranty of soundness if the unsoundness does not exist at the time of the sale. As where a horse's leg was so ill-formed that he could not work for any length of time without cutting, so as to produce lameness;<sup>1</sup> or had curby hocks, that is, hocks so formed as to render him very liable to throw out a curb, and thus produce lameness;<sup>2</sup> or thin-soled feet, also likely to produce lameness.<sup>3</sup>

But a horse may have a congenital defect, which, in itself, is unsoundness. In *Holliday v. Morgan*,<sup>4</sup> a horse sold with a warranty of soundness, had an unusual convexity in the cornea of the eye, which caused short-sightedness, and a habit of shying. The direction to the jury was that "if they thought the habit of shying arose from defectiveness of vision, caused by natural malformation of the eye, this was unsoundness." All the judges held this direction correct, and concurred in the doctrine of *Kiddell v. Burnard*,<sup>5</sup> that the true test of unsoundness is, as expressed by Hill, J., "whether the defect complained of *renders the horse less than reasonably fit for present use.*"

Where the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of a warranty in the former case, or to extend it in the latter, by inference or implication.

Parol evidence inadmissible to prove warranty where the sale is written.

In *Kain v. Old*,<sup>6</sup> the bill of sale in the usual form, contained no warranty that the vessel sold was copper-fastened; there had been a previous written representation by the vendor that she was copper-fastened. Held, that this prior representation formed no part of the contract, and was not a warranty. Abbott, C. J., thus expounded the law:—"Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the

*Kain v. Old.*

<sup>1</sup> *Dickinson v. Follett*, 1 M. & Rob. 299.

<sup>2</sup> *Brown v. Elkington*, 8 M. & W. 132.

<sup>3</sup> *Bailey v. Forrest*, 2 Car. & K. 131.

<sup>4</sup> 1 E. & E. 1; 23 L. J., Q. B. 9.

<sup>5</sup> 9 M. & W. 668.

<sup>6</sup> 2 B. & C. 627.

contract, though not always; because matter talked of at the commencement of a bargain, may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract. A matter antecedent to and dehors the writing, may in some cases be received in evidence, as showing the inducement to the contract, such as a representation of some particular quality or incident to the thing sold; but the buyer is not at liberty to show such a representation, unless he can also show that the seller, by some fraud, prevented him from discovering a fault which he, the seller, knew to exist."<sup>1</sup>

But where the written paper was in the nature of an informal receipt merely, held, that parol evidence of a warranty was admissible.<sup>2</sup>

Dickson v.  
Zizania.

In *Dickson v. Zizania*,<sup>3</sup> there was an express warranty that a cargo of Indian corn, sold to the plaintiff, should be equal to the average of shipments of Salonica of that season, and should be shipped in good and merchantable condition, and the Court refused to allow the warranty to be extended by evidence or implication, so as to render the defendant answerable that the corn should be in fit condition for a foreign voyage.

Bigge v. Park-  
inson.

But in *Bigge v. Parkinson*,<sup>4</sup> where the vendor gave a written guaranty that stores furnished for a troop-ship should pass survey by the East India Company's officers, this was held not to dispense the vendor from the warranty implied by law,<sup>5</sup> that the provisions should be reasonably fit for use for the intended purpose.

Bywater v.  
Richardson.

In *Bywater v. Richardson*,<sup>6</sup> there was a warranty of soundness, but the purchase was made at a repository, where there was a rule painted on a board fixed to the wall, that a warranty of soundness, when given there, was to

<sup>1</sup> See, also, *Pickering v. Dowson*,  
<sup>4</sup> Taunt. 779; *Wright v. Crookes*, 1  
Scott, N. R. 685.

<sup>2</sup> *Allen v. Pink*, 4 M. & W. 140.

<sup>3</sup> 10 C. B. 602; 20 L. J., C. P. 72.

<sup>4</sup> 7 H. & N. 955; 31 L. J., Ex.  
301, in Cam. Scaoc.

<sup>5</sup> *Post*, Implied warranty of  
quality.

<sup>6</sup> 1 Ad. & E. 508.

remain in force only until twelve o'clock at noon, on the day next after the sale; and the Court held, that on proof of the buyer's knowledge of the rules, the warranty was limited, and it was the same as if the seller had told him that he would warrant the horse against such defects only as might be pointed out within twenty-four hours.

Blackstone says: that "The warranty can only reach to things in being at the time of the warranty made, and not to things *in futuro*: as that a horse is sound at the buying of him, not that he will be sound two years hence."<sup>1</sup> But the law is now different, as is explained by Mr. Justice Coleridge in his notes on this passage. Lord Mansfield, also, in a case,<sup>2</sup> where this passage was cited, said: "There is no doubt but you may warrant a future event."

Warranty of  
future sound-  
ness.

Warranties are sometimes given by agents, without express authority to that effect. In such cases the question arises as to the power of an agent, who is authorised to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorised to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual.<sup>3</sup> If in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale.

Warranties by  
agents.  
General rule.

Thus, in *Alexander v. Gibson*,<sup>4</sup> a servant who was sent to sell a horse *at a fair*, and receive the price, was held by Lord Ellenborough to be authorised to give a warranty of soundness, because "this is the common and usual manner in which the business is done."

*Alexander v.*  
*Gibson.*

In *Dingle v. Hare*,<sup>5</sup> an agent selling guano, was held authorised to warrant it to contain 80 per cent. of phosphate of best quality, the jury having found as a fact, that ordinarily these manures were sold with such a warranty, all

*Dingle v. Hare.*

<sup>1</sup> 3 Bl. Com. 166.

<sup>2</sup> *Eden v. Parkinson*, 2 Doug. 735.

<sup>3</sup> *Bayliffe v. Butterworth*, 1 Ex. 425; *Graves v. Legg*, in Cam. Scacc. 2 H. & N. 210; 26 L. J., Ex. 316;

*Pickering v. Busk*, 15 East, 38.

<sup>4</sup> 2 Camp. 555. See, also, *Helyear v. Hawke*, 5 Esp. 72.

<sup>5</sup> 7 C. B., N. S. 145; 29 L. J., C. P. 144.

the judges agreeing, and Byles, J., saying: "It is clear law, that an agent to sell has authority to do all that is necessary and usual in the course of the business of selling, and if it was usual in the trade for the seller to warrant, Wilson (the agent) had authority to warrant."

Brady v. Todd.

Quite recently, in *Brady v. Todd*,<sup>1</sup> the Common Pleas had before it the subject of warranty of a horse, by a servant authorised to sell, and Erle, C. J., gave the unanimous decision of the judges after advisement. As this is the most authoritative exposition of the present state of the law on this point, full extracts are given. The facts were, that the plaintiff applied to the defendant, who was *not a dealer in horses*, but a tradesman in London, having also a farm in Essex, in order to buy the horse, and the defendant thereupon sent his farm-bailiff with the horse to the plaintiff, with authority to sell, but none to warrant. The bailiff warranted the horse to be sound and quiet in harness; and it was contended that "an authority to an agent to sell and deliver imports an authority to warrant," which the Court held to be an undecided point. After referring to *Helyear v. Hawke*, and *Alexander v. Gibson*, *supra*, and *Fenn v. Harrison*,<sup>2</sup> the learned Chief Justice said: "We understand those judges to refer to a *general* agent employed for his principal to carry on his business, that is, the business of horse dealing, *in which case there would be by law, the authority here contended for.* \* \* \* It is also contended that a *special* agent, without any express authority, in fact, might have an authority by law to bind his principal, as where the principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case the principal is concluded from denying this authority as against the party who believed what was held out and acted on it (see *Pickering v. Busk*),<sup>3</sup> but the facts do not bring the defendant within this rule. The main reliance was placed on the argument that an authority to sell, is by implication an authority to do all

<sup>1</sup> 9 C. B., N. S. 592; 20 L. J., C. P. 223.

<sup>2</sup> 3 T. R. 759.

<sup>3</sup> 15 East, 38.

that in the usual course of selling is required to complete a sale, and that the question of warranty is in the usual course of a sale required to be answered; and that, therefore, the defendant by implication gave to Greigg (the farm-bailiff) an authority to answer that question, and to bind him by his answer. It was a part of this argument that an agent authorized to sell and deliver a horse is held out to the buyer as having authority to warrant. But on this point, also, the plaintiff has, in our judgment, failed.

“ We are aware that the question of warranty frequently arises upon the sale of horses, but we are also aware that sales may be made without any warranty, or even an inquiry about warranty. If we laid down for the first time that the *servant of a private owner*, intrusted to sell and deliver a horse on *one particular occasion*, is therefore by law authorized to bind his master by a warranty, we should establish a precedent of dangerous consequence. For the liability created by a warranty extending to unknown as well as known defects, is greater than is expected by persons inexperienced in law: and as everything said by the seller in bargaining may be evidence of warranty to the effect of what he said, an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability which would be a surprise equally to the servant and the master. We therefore hold, that the buyer taking a warranty from such an agent as was employed in this case, takes it at the risk of being able to prove that he had the principal's authority, and if there was no authority in fact, the law does not in our opinion create it from the circumstances. \* \* \* It is unnecessary to add, that if the seller should repudiate the warranty made by his agent, it follows that the sale would be void, there being no question raised upon this point.”

#### SECTION II.—IMPLIED WARRANTY OF TITLE.

THE law in relation to the implied warranty of title in chattels sold was in an unsettled state until a recent deci-

Implied warranty of title.



sion in the Common Pleas, which has gone far towards establishing a satisfactory rule.

In the examination of the subject, it will be found that on some points there is no conflict of opinion.

Warranty exists in executing agreement.

*First.*—It is well settled that in an executory agreement, the vendor warrants, by implication, his title in the goods which he promises to sell. Plainly, nothing could be more untenable than the pretension that if A. promised to sell 100 quarters of wheat to B., the contract would be fulfilled by the transfer, not of the *property* in the wheat, but of the *possession* of another man's wheat.

Affirmation by vendor that the chattel is his is a warranty of title.

This affirmation may be implied from his conduct.

*Secondly.*—It is also universally conceded, that in the sale of an ascertained specific chattel, an affirmation by the vendor that the chattel *is his*, is equivalent to a warranty of title; and that this affirmation may be *implied* from his conduct, as well as from his words, and may also result from the nature and circumstances of the sale.

In absence of such affirmation, quære?

But it has been said, *thirdly*, that in the absence of such implication, and where no express warranty is given, the vendor, by the mere sale of a chattel, does not warrant his title and ability to sell, though all again admit,

If vendor knows he has no title, and conceals the fact, it is fraud.

One question only that is controverted.

*Fourthly.*—That if in such case the vendor *knew* he had no title, and concealed that fact from the buyer, he would be liable on the ground of *fraud*.

The one controverted question is thus narrowed to this point, whether in the sale of a chattel an innocent vendor by the mere act of sale asserts that he is owner, for if so, he warrants according to the second of the foregoing rules.

Discussion of the subject and review of the authorities.

The negative is stated to be the true rule of law on this point in recent text-books of deservedly high repute.<sup>1</sup> Undoubtedly, in some of the ancient authorities on the common law, the rule is substantially so stated. In Noy's Maxims, c. 42, it is said: "If I take the horse of another man and sell him, and the owner take him again, I may have an action of debt for the money; for the bargain was perfect

<sup>1</sup> Chitty on Cont. 413 (8th ed.); Ev. 997; Bullen and Leake, Prec. of Broom's Legal Max. 766 (4th ed.); Pl. 229-30. Leake on Cont. 198; 2 Taylor on

by the delivery of the horse, and *caveat emptor*:" and in Co. Lit. 102 a, Coke says: "Note, that by the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not unless there be a warranty, either in deed or in law, for *caveat emptor*." Blackstone, however, gives the contrary rule,<sup>1</sup> "if the vendor sells them as his own." But the authority mainly relied on by the learned authors mentioned in the note, is the elaborate opinion given by Parke, B., in the case of *Morley v. Attenborough*,<sup>2</sup> where the *dicta* of that eminent judge certainly sustain the proposition, although the point was not involved nor decided in the case.

It is, however, the fact that no direct decision has ever been given in England to the effect that where a man sells a chattel he does not thereby warrant the title.<sup>3</sup> It has been often said in cases that such was the rule of law, but no case has been decided directly to that effect. Since the decision in *Morley v. Attenborough*, there have been repeated references to the *dicta* contained in the opinion of Parke, B., on this point, and dissatisfaction with them has been more than once suggested. It will be quite sufficient to confine the review of the decisions to *Morley v. Attenborough* and the subsequent cases, as they contain a full discussion of the whole subject, and reference to all the old authorities.

*Morley v. Attenborough*<sup>4</sup> was the case of an auction-sale, by order of a pawnbroker, of unredeemed pledged goods, *eo nomine*, and the Court decided that in the absence of an express warranty, all that the pawnbroker asserted by his offer to sell was, that the thing had been pledged to him and was unredeemed, not that the pawnor had a good title; not professing to sell *as owner*, he did not warrant ownership. The following language contains the *dicta* :—

"The bargain and sale of a specific chattel by our law (which differs in that respect from the civil law), un-

*Morley v. Attenborough.*

<sup>1</sup> 2 Bl. Com. 451.

Banister, 17 C. B., N. S. 708; 34

<sup>2</sup> 3 Exch. 500.

L. J., C. P. 105.

<sup>3</sup> *Per* Byles, J., in *Eichholz v.*

<sup>4</sup> 3 Ex. 500.

doubtedly transfers all the property the vendor has, where nothing further remains to be done, according to the intent of the parties, to pass it. But it is made a question whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor that he has the ability to convey. With respect to *executory contracts* of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied under similar circumstances that a merchantable article was to be supplied. Unless goods which the party could enjoy as his own and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery; and if he did, and the goods were recovered from him, he would not be bound to pay, or having paid, he would be entitled to recover back the price, as on a *consideration which had failed*. But where there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title, or has it merely the effect of transferring such title as the vendor has? \* \* \* The result of the older authorities is, that there is by the law of England, no *warranty of title in the actual contract of sale, any more than there is of quality*. The rule of *caveat emptor* applies to both; but if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality. This rule will be found in Co. Litt. 102 a; 3 Rep. 22 a; Noy, Max. 42; Fitz. Nat. Brev. 94 c; in *Springwell v. Allen*, Aleyn, 91, cited by Littledale, J., in *Early v. Garrett*, 9 B. & C. 982, and in *Williamson v. Allison*, 2 East, 449, referred to in the argument. \* \* \* It may be, that, as in the earlier times the chief transactions

of purchase and sale were in markets and fairs, where the *bonâ fide* purchaser obtained a good title as against all except the crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. VIII. c. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale. *In recent times a different notion appears to have been gaining ground* (see note of the learned editor to 3 Rep. 22 a); and Mr. Justice Blackstone says, 'In contracts for sale, it is constantly understood that the seller undertakes that the commodity he sells is his own;' and Mr. Wooddeson, in his Lectures, goes so far as to assert that the rule of *caveat emptor* is exploded altogether, which no authority warrants.

"At all times, however, the vendor was liable, if there was a warranty *in fact*, and at an early period the affirming those goods to be his own by a vendor in possession, appears to have been deemed equivalent to a warranty. Lord Holt, in *Medina v. Stoughton* (1 Salk. 210, Ld. Raymond, 598), says that 'where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty.' And Mr. Justice Buller, in *Pasley v. Freeman* (3 T. R. 57), disclaims any distinction between the effect of an affirmation when the vendor is in possession or not, treating it as equivalent to a warranty in both cases. \* \* \* From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal in *Ormerod v. Huth* (14 M. & W. 664), it would seem that there is no implied warranty of title on the sale of goods, and that if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by *declarations or conduct*; and the question in each case where there is no warranty in express terms will be, whether there are such circumstances as will be equivalent to such a warranty. Usage of trade, as a matter of fact, would of course be sufficient to raise an inference of such an engagement: and without proof of such usage the very nature of the trade may be

enough to lead to the conclusion, that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to. \* \* \* We do not suppose that there would be any doubt if the articles are bought in a shop professedly carried on for the sale of goods, that *the shopkeeper must be considered as warranting, that those who purchase will have a good title to keep the goods purchased.* In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title.

"But in the case now under consideration the defendant can be made responsible only *as on a sale of a forfeited pledge eo nomine*, \* \* \* and the question is whether on such a sale, accompanied with possession, there is *any assertion of an absolute title to sell*, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed." *Held*, that the latter was the true meaning of the contract. The learned judge continued as follows: "It may be that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to, if the purchaser should not have a good title. But if there is no implied warranty of title, *some circumstances must be shown* to enable the plaintiff to recover *for money had and received*. This case was not made at the trial, and the only question is whether there was an implied warranty."

Hall v. Conder. Next came Hall v. Conder.<sup>1</sup> The written sale stated that the plaintiff had obtained a certain patent in this country, and had already sold "an interest of one-half of the said English patent, and is desirous of disposing of the remaining half, to which he hereby declares that he has full right

<sup>1</sup> 2 C. B., N. S. 22; 26 L. J., C. P. 138, 288.

*and title*," and he thereupon conveyed to the defendant "the above-mentioned one-half of the English patent hereinbefore referred to." In an action for the price the defendant pleaded, *first*, that the alleged invention was worthless, of no public utility, and not new in England; and *secondly*, that the plaintiff was not the true and first inventor thereof. The Court held that there was no warranty that the patent right was a good right, saying: "Did the plaintiff *profess to sell*, and the defendants to buy, a good and indefeasible patent right? or was the contract merely to place the defendant in the same situation as the plaintiff was in, with reference to the alleged patent?" Held, that the latter was the true nature of the contract. In this case, again, there is nothing to show that a sale of a chattel does not imply an affirmation of ownership, for there was an *express* warranty of ownership; but the subject-matter and true construction of the warranty were the points in question, and the warranty was held to mean that the patent, *such as it was*, belonged to the plaintiff, and to no one else, not that the patent was free from intrinsic defects that might make it voidable or defeasible. The *dicta*, however, were strongly in support of those in *Morley v. Attenborough*.

So, in *Smith v. Neale*,<sup>1</sup> the same Court, on facts almost identical with those of the preceding case, held, that a contract for the sale or assignment of a patent involves no warranty that the invention is new, but merely that her Majesty had granted to the vendor the letters patent, which were the thing sold. *Smith v. Neale.*

In *Chapman v. Speller*,<sup>2</sup> the plaintiff gave the defendant 5*l.* profit on a purchase made by the defendant at a sheriff's sale under a writ of *fi. fa.*, and the defendant handed to the plaintiff the receipt, which he had got from the auctioneer, in order to enable the plaintiff to claim the goods. The goods were afterwards taken under a superior title, and the plaintiff brought action, alleging a warranty of title by the defendant; but the Court refused to consider the point of *Chapman v. Speller.*

<sup>1</sup> 2 C. B., N. S. 67; 26 L. J., C. P. 143.      <sup>2</sup> 14 Q. B. 621; 19 L. J., Q. B. 241.

law, saying that the defendant had only sold "the right, whatever it was, that he had acquired by his purchase at the sheriff's sale." The Court, however, added: "We wish to guard ourselves *against being supposed to doubt the right to recover back money paid upon an ordinary purchase of a chattel*, where the purchaser does not have that for which he paid."

Sims v. Mar-  
ryat.

In *Sims v. Marryat*,<sup>1</sup> there were affirmations by the defendant, which were construed to amount to an express warranty, and the question now under consideration was not decided; but Lord Campbell said: "It does not seem necessary to inquire what is the general law as to implied warranty of title on sales of personal property, *which is not quite satisfactorily settled*. According to *Morley v. Attenborough*, if a pawnbroker sells unredeemed pledges he does not warrant the title of the pawnor, but merely undertakes that the time for redeeming the pledges has expired, and he sells only such right as belonged to the pawnor. Beyond that the decision does not go, but *a great many questions are suggested in the judgment, which still remain open*."

Eichholz v.  
Banister.

Then came *Eichholz v. Banister*,<sup>2</sup> in which one of the open questions at least was expressly decided by the Common Pleas in Michaelmas, 1864. The facts were very simple. The plaintiff went to the warehouse of the defendant, a "job-warehouseman" in Manchester, and bought certain goods, which the defendant said were "a job-lot just received by him." The following was the invoice, which was in print, except the words in italics:

20, Charlton Street, Portland Street,  
Manchester, April 18, 1864.

Mr. *Eichholz*,

Bought of R. Banister, job-warehouseman.

Prints, grey fustians, &c., job and perfect yarns, in hanks, cops, and bundles.

17 pieces of prints, 52 yards, at 5¼d. per yard	£19	6	0
1½ per cent. for cash.		0	6
		19	0

<sup>1</sup> 17 Q. B. 281; 20 L. J., Q. B. 454.

<sup>2</sup> 17 C. B., N. S. 708; 34 L. J., C. P. 105.

The price was paid and the goods delivered, but it turned out that they had been stolen, and the buyer was compelled to restore them to the true owner, and brought action on the *common money counts*, to which the defendant pleaded *never indebted*. Defendant insisted at the trial that he had not warranted title, and the point was reserved. The judges gave separate opinions, all concurring in the existence of a warranty of title.

Erle, C. J., said that the rule was taken on a point of law that "a vendor of personal chattels does not enter into a warranty of title, but that the purchaser takes them at his peril, and the rule of *caveat emptor* applies. \* \* \* I decide in accordance with the current of authorities, that if the vendor of a chattel at the time of the sale either by words affirm that he is the owner, or by his conduct gives the purchaser to understand that he is such owner, then it forms part of the contract, and if it turns out in fact that he is not the owner, the consideration fails, and the money so paid by the purchaser can be recovered back." After quoting a passage from the opinion in *Morley v. Attenborough*, his Lordship continued: "I think where the sale is as it was in the present case, the shopkeeper does by his conduct affirm that he is the owner of the article sold, and he therefore contracts that he is such owner; and if he be not in fact the owner, the price paid for the purchase can be recovered back from him. So much for the present case." His Lordship, then referring to the old authorities cited, said of the passage from Noy, quoted *ante*, p. 466, that "at first sight, this would shock the understanding of ordinary persons; but I take the meaning of the principle which it enunciates to be that where the transaction is of this nature, that I have the manual *possession* of a chattel, and without my affirming that I am the owner or not, you choose to buy it of me *as it is*, and give me the money for it, you the purchaser taking it on those terms cannot afterwards recover back what you have paid because it turns out that I was not the true owner." His Lordship then pointed out that *Morley v. Attenborough*, *Chapman v. Speller*, and



Hall *v.* Conder, had all been decided on this principle; and that in "all these cases I think that the conduct of the vendor expressed that the sale was a sale of such title only as the vendor had; but in all ordinary sales the party who undertakes to sell, exercises thereby the strongest act of dominion over the chattel which he proposes to sell, and would, therefore, as I think, commonly lead the purchaser to believe that he was the owner of the chattel. In almost all ordinary transactions in modern times the vendor, in consideration of the purchaser paying the price, is understood to affirm that he is the owner of the article sold."

\* \* \* The present case shows, I think, the wisdom of Lord Campbell's remark on the judgment of Parke, B., in Morley *v.* Attenborough, when he said:<sup>1</sup> 'It may be that the learned Baron is correct in saying, that on a sale of personal property the maxim of *caveat emptor* does by the law of England apply, but if so, there are many exceptions stated in the judgment which well nigh eat up the rule.'

Byles, J., concurred, and said: "It has been stated over and over again, that the mere sale of chattels does not involve a warranty of title, but certainly such statement stands on barren ground, and is not supported by one single decision; and it is subject to this exception, that if the vendor by his acts or by surrounding circumstances affirm the goods to be his, then he does warrant the title. Lord Campbell was right when he said that the exceptions to the application of *caveat emptor* had well nigh eaten up the rule."

Keating, J., concurred.

Remarks on  
this case.

It is impossible to read the judgment of Erle, C. J., in this case without yielding assent to the assertion that in modern times, in all ordinary sales, the vendor by exercising the highest act of dominion over the thing in offering it for sale, thereby leads a purchaser to believe that he is owner. This being equivalent to a warranty, the result would be, in modern times, that as a general rule the mere

<sup>1</sup> In *Sims v. Marryat*, 17 Q. B. 281; 20 L. J., Q. B. 454.

sale of a chattel implies a warranty of title, whereas the old rule is accounted for by Parke, B., on the ground that in the olden days the question of title did not enter into men's minds or intentions, because the sales were commonly made in market overt, where the title obtained by the buyer was good against everybody but the sovereign. It should also be remembered, when inferences are drawn from very ancient decisions, that there formerly existed statutory provisions which have long grown obsolete. The laws passed in the times of Ethelbert and Edgar specially prohibited the sale of anything above the value of 20*d.* unless in open market, and directed every bargain and sale to be made in the presence of credible witnesses.<sup>1</sup>

The question was alluded to by the Lord Chancellor (Chelmsford) in delivering the opinion of the Court in *Page v. Cowasjee Eduljee*,<sup>2</sup> where, in the case of the sale of a stranded vessel by the master, he said: "But supposing the plaintiff to have acted upon a mistaken view of the necessity of the case, the defendant could not insist upon there being any implied warranty of title. The plaintiff sold the vessel in the special character of master, *and not as owner*, and acted upon a *bond fide* belief of his authority to sell."

The subject was again considered in the Common Pleas in Trinity Term, 1867, in *Bagueley v. Hawley*,<sup>3</sup> but with no satisfactory progress towards a final settlement of the point. The defendant bought a boiler, at auction, under distress for a poor-rate. The boiler was set in brick-work, and was too large to be taken away without taking down part of the outer wall of the boiler-house. The defendant agreed to sell it to the plaintiff at an advanced price as it stood. The plaintiff knew that the boiler had been bought at the auction by the defendant, and went with him to the auctioneer to obtain an extension of time for taking away the boiler; and this was conceded to him, but

*Bagueley v.  
Hawley.*

<sup>1</sup> Wilkins' Leg. Anglo-Sax., LL. 127-144; 3 Moore P. C., N. S. 499. Ethel. 10, 12; Eadg. 80.

<sup>2</sup> Law R. 2, C. P. 625; 36 L. J.,

<sup>3</sup> Law Rep. 1, Priv. C. App. C. P. 328.

when he went to remove it, persons claiming to be mortgagees had it at work, and refused to allow its removal, stating that it had been illegally distrained. The plaintiff insisted that there was a warranty of title, and a warranty that he should be allowed to remove the boiler; the defendant contended that he merely sold such title as he had. Blackburn, J., left it as a question of fact to the jury, who found that the sale was absolute and unconditional, and that there was an understanding that the plaintiff was to have effectual possession of the boiler, and they gave a verdict for the plaintiff. On leave reserved, a rule was made absolute for a nonsuit, by Bovill, C. J., and M. Smith, J.; *dissentiente* Willes, J. Bovill, C. J., put his opinion on the ground that by the general rule of law no warranty is implied in the sale of goods; but Smith, J., on the principle of *Chapman v. Speller*; while Willes, J., agreed with the jury and Blackburn, J., that "the thing which the defendant sold was a boiler and not a law-suit." The circumstances were so peculiar and the opinions of the judges so little in accord, that the case has not much value as a precedent.

Submitted that  
the general rule  
is now changed.

On the whole, it is submitted that, since the decision in *Eichholz v. Banister*, the rule is substantially altered. The exceptions have become the rule, and the old rule has dwindled into the exception, by reason, as Lord Campbell said, "of having been well nigh eaten away." The rule at present would seem to be stated more in accord with the recent decisions if put in terms like the following: *A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattel sold.*

*Eichholz v. Banister* was on the money counts, and therefore, strictly speaking, only decides that the price paid may be recovered back by the buyer on the failure of title in the thing sold; but as the *ratio decidendi* was that there was a warranty implied as part of the contract, there seems no

reason to doubt that the vendor would also be liable for unliquidated damages for breach of warranty.

Before leaving this subject, it should be noted that in *Dickenson v. Naul*,<sup>1</sup> and in *Allen v. Hopkins*,<sup>2</sup> it was decided that where a party had bought and received delivery of goods from one not entitled to sell, and had afterwards paid the price to the true owner, he was not liable to an action by the first vendor for the price; these decisions being directly opposed to the maxim in *Noy*, quoted *ante*, p. 466.

*Dickenson v. Naul.*  
*Allen v. Hopkins.*

In America, the distinction between goods in possession of the vendor and those not in possession, so decisively repudiated by Buller, J., in *Pasley v. Freeman*,<sup>3</sup> and by the judges in *Eichholz v. Banister*,<sup>4</sup> and in *Morley v. Attenborough*,<sup>5</sup> seems to be fully upheld; and the rule there is, that as to goods in possession of the vendor there is an implied warranty of title;<sup>6</sup> but where the goods sold are in possession of a third party at the time of the sale, there is no such warranty, and the vendee buys at his peril.<sup>7</sup> And in the note of the learned editor of the last edition of Story on Sales (3rd Ed. p. 459), it is said that "this distinction has now become so deeply rooted in the decisions of Courts, in the *dicta* of judges, and in the conclusions of learned authors and commentators, that even if it were shown to be misconceived in its origin, it could not at this day be easily eradicated." And Kent sustains this view of the law of the United States.<sup>8</sup>

Decisions in America.

By the Civil law, the warranty against eviction exists in all cases. The law 3 ff. de act. empt. gives the maxim in

<sup>1</sup> 4 B. & Ad. 638.

<sup>2</sup> 13 M. & W. 94.

<sup>3</sup> 3 T. R. 58.

<sup>4</sup> 17 C. B., N. S. 708.

<sup>5</sup> 3 Ex. 500.

<sup>6</sup> 4 *Bennett v. Bartlett*, 6 Cush. 225; *Vibbard v. Johnson*, 19 Johnson, 78; *Case v. Hall*, 24 Wendell,

102; *Dorr v. Fisher*, 1 Cushing, 273.

<sup>7</sup> *Huntington v. Hall*, 36 Maine, 501; *McCoy v. Archer*, 3 Barbour, 323; *Dresser v. Ainsworth*, 9 Barbour, 619; *Edick v. Crim*, 10 Barbour, 445; *Long v. Hickingbottom*, 28 Miss. 772.

<sup>8</sup> Vol. 2, p. 681 (11th ed.).

the words of Pomponius as follows: "*Datio possessionis quæ a venditore fieri debet talis est ut si quis eam possessionem jure avocaverit, tradita possessio non intelligatur.*"

Pothier.

Pothier gives the rule in these words: "The vendor's obligation is not at an end when he has delivered the thing sold. He remains responsible after the sale, to warrant and defend the buyer against eviction from that possession. This obligation is called warranty."<sup>1</sup>

French Code.

In the French law, so deeply implanted is the obligation of warranty against eviction, that it exists so far as to compel return of the price, even though it has been expressly agreed that there shall be no warranty. The articles of the Civil Code are as follows:—1625. The warranty due by the vendor to the purchaser has two objects: *first*, the peaceful possession of the thing sold; *secondly*, the concealed defects or redhibitory vices of the thing.

1626. Although at the time of sale there may have been no stipulation as to warranty, the seller is legally bound to warrant the buyer against suffering total or partial eviction from the thing sold, or from liens asserted on the thing (*charges prétendues sur cet objet*), and not mentioned at the time of the sale.

1627. The parties may, by special convention, add to this legal obligation, or diminish its effect, and may even stipulate that the vendor shall be liable to no warranty.

1628. Although it be stipulated that the vendor shall be liable to no warranty, he remains bound to a warranty against his own act: any contrary agreement is void.

1629. In the same case, of a stipulation of no warranty, the vendor remains bound to return the price to the purchaser in the event of eviction, unless the buyer knew, when he bought, the danger of eviction, or unless he bought at his own risk and peril.

This subject, however, is more fully treated *ante*, Book II. Ch. 7, on the Nature and Effect of a sale by the Civil Law.

<sup>1</sup> Vente, 2 Part, Ch. 1, Sec. 2, No. 82.

## SECTION III.—IMPLIED WARRANTY OF QUALITY.

The maxim of the common law, *caveat emptor*, is the general rule applicable to sales, so far as quality is concerned. The buyer (in the absence of fraud), purchases at his own risk, unless the seller has given an express warranty, or unless a warranty be implied from the nature and circumstances of the sale.

Caveat emptor is the general rule.

A representation anterior to the sale, and forming no part of the contract when made, is, as already shown (*ante*, p. 452), no warranty; but a representation, even though only an inducement to the contract, and forming no part of it, will, if false to the knowledge of the vendor, be a ground for rescinding the contract as having been effected through fraud.

So far as an ascertained specific chattel, *already existing, and which the buyer has inspected*, is concerned, the rule of *caveat emptor* admits of no exception by *implied warranty of quality*.<sup>1</sup>

No exception where an existing specific chattel inspected by buyer has been sold.

But where a chattel is to be made or supplied to the order of the purchaser, there is an implied warranty that it is reasonably fit for the purpose for which it is ordinarily used, or that it is fit for the special purpose intended by the buyer, if that purpose be communicated to the vendor when the order is given, as is shown by the authorities now to be reviewed. If the specific existing chattel, however, is sold by description, and does not correspond with that description, the vendor fails to comply, not with a warranty or collateral agreement, but with the contract itself, by breach of a condition precedent, as explained *ante*, p. 442. This was strongly exemplified in *Josling v. Kingsford*,<sup>2</sup> where the vendor was held bound, as on a condition precedent, to deliver "oxalic acid," although he had exhibited the bulk of the article sold to the buyer, and written to him that he would

Chattel to be made or supplied, implied warranty of quality.

Specific chattel sold by description.

<sup>1</sup> *Parkinson v. Lee*, 2 East, 314; <sup>2</sup> 13 C. B., N. S. 447; 32 L. J., C. Chanter v. Hopkins, 4 M. & W. 64, P. 94. and cases cited *ante*, p. 453.

not warrant its strength, in order to "avoid any unpleasant differences," and suggested to him to make a fresh examination if he thought proper. On the other hand, a severe application of the rule of *caveat emptor*, where the thing sold answers the description, together with a lucid statement of the law, and the distinction between warranty of quality and description of the thing, may be found in the decision of the Exchequer of Pleas, delivered by Parke, B., in *Barr v. Gibson*.<sup>1</sup> The defendant sold to the plaintiff, on the 21st October, 1836, "all that ship or vessel, called the Sarah, of Newcastle, &c.," covenanting in the deed-poll by which the conveyance was made, that he "had good right, full power, and lawful authority" to sell. It turned out that the ship, which was on a distant voyage, had got ashore on the coast of Prince of Wales's Island on the 13th October, eight days *before* the sale; on a survey, on the 14th, it was recommended that she should be sold as she lay, because, under the circumstances of the winter coming on, and the want of facilities and assistance, the ship could not be got off so as to be repaired there: but if in England she might easily have been got off. At the sale, on the 24th October, the hull produced only 10*l*. Patteson, J., left it to the jury to say whether, at the time of the sale to the plaintiff, the vessel was or was not a *ship*, or a mere bundle of timber, and the jury found she was *not* a ship. On a rule to set aside the verdict, which was thereupon given for the plaintiff, Parke, B., said: "The question is not what passed by the deed, but what is the meaning of the covenant contained in it."

"In the bargain and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud), imply any warranty of the good quality or condition of the chattel so sold. The simple bargain and sale, therefore, of the ship *does not imply a contract that it is then seaworthy, or in a serviceable condition*; and the express covenant that the defendant has full power to bargain and sell,

<sup>1</sup> 3 M. & W. 390.

does not create any further obligation in this respect. But the bargain and sale of a chattel, as being of a particular description, *does imply a contract that the article sold is of that description*; for which the cases of *Bridge v. Wain*,<sup>1</sup> and *Shepherd v. Kain*,<sup>2</sup> and other cases, are authorities; and therefore the sale in this case of a ship, *implies a contract*, that the subject of the transfer did exist in the character of a ship, and the *express covenant* that the defendant had power to make the bargain and sale of the subject before mentioned must operate as an *express covenant to the same effect*. That covenant, therefore, was broken if the subject of the transfer had been at the time of the covenant physically destroyed, or had ceased to answer the designation of a ship; but if it still bore that character, there was no breach of the covenant in question, *although the ship was damaged, unseaworthy, or incapable of being beneficially employed*. The contract is for the sale of the subject *absolutely*, and not with reference to collateral circumstances. If it were not so, it might happen that the same identical thing in the same state of structure might be a ship in one place, and not in another, according to the local circumstances and conveniences of the place where she might happen to be. If the contracting parties intend to provide for any particular state or condition of the vessel, they should introduce an express stipulation to that effect. \* \* \* We are of opinion upon the evidence given on the trial, the ship did continue to be capable of being transferred as such at the time of the conveyance, though she might be totally lost within the meaning of a contract of insurance. \* \* \* Here the subject of the transfer had the form and structure of a ship, although on shore, with the possibility, though not the probability, of being got off. She was still a ship, though at the time incapable of being, from the want of local conveniences and facilities, beneficially employed as such." New trial ordered.<sup>3</sup>

<sup>1</sup> 1 Starkie, 504.

<sup>2</sup> 5 B. & Ald. 210.

<sup>3</sup> See cases cited *ante*, pp. 442, *et seq.*



Implied warranties.

Of implied warranties in sales of chattels, there are several recognised by law.

Sales by sample.

The first and most general is, that in a sale of goods by sample, the vendor warrants the quality of the bulk to be equal to that of the sample. The rule is so universally taken for granted that it is hardly necessary to give direct authority for it. The cases are very numerous in which it has been applied as a matter of course. In *Parker v. Palmer*,<sup>1</sup> Abbott, C. J., stated it in this language: "The words, per sample, introduced into this contract, may be considered to have the same effect as if the seller had in express terms warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale." And in *Parkinson v. Lee*,<sup>2</sup> Lawrence, J., in a sale of hops by sample, said, that the contract was "No more than that the bulk should agree with the sample," and the latter is the phrase used by the judges, *passim*.

In a sale of goods by sample, it is an implied condition, as shown, *ante*, p. 440, that the buyer shall have a fair opportunity of comparing the bulk with the sample; and an improper refusal by the vendor to allow this, will justify the buyer in rejecting the contract.<sup>3</sup>

All sales where sample shown not necessarily sales "by sample."

It must not be assumed that in all cases where a sample is exhibited, the sale is a sale "by sample." The vendor may show a sample, but decline to sell by it, and require the purchaser to inspect the bulk at his own risk; or the buyer may decline to trust to the sample and the implied warranty, and require an express warranty, in which case there is no implied warranty, for "*expressum facit cessare tacitum*."

*Tye v. Fynmore*.

Thus, in *Tye v. Fynmore*,<sup>4</sup> where the vendor exhibited a sample of "sassafras wood," and the buyer inspected it, and had skill in the article, and the vendor then warranted the goods to be "fair merchantable sassafras wood," it was held not to be a sale by sample with implied warranty, but a sale with express warranty.

<sup>1</sup> 4 B. & Ald. 387.

<sup>2</sup> 2 East, 314.

<sup>3</sup> *Lorymer v. Smith*, 1 B. & C. 1.

<sup>4</sup> 3 Camp. 462.

So in *Gardiner v. Gray*,<sup>1</sup> the sale was of waste silk, and a sample was shown, but Lord Ellenborough said it was not a sale "by sample." "The sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity."

*Gardiner v. Gray.*

So in *Powell v. Horton*,<sup>2</sup> where a sample of the goods sold was exhibited, but the written contract was construed to contain a warranty that they should be "Scott and Co.'s mess pork," it was held not to be a sale "by sample," but a sale with express warranty.

*Powell v. Horton.*

So also have we seen in the very stringent case of *Josling v. Kingsford*,<sup>3</sup> where the buyer not only inspected the samples, but the bulk; and the vendor said he would not warrant the strength of the "oxalic acid" sold; yet the purchaser was held not bound to accept the article, because, by adulteration with sulphate of magnesia, a defect not visible to the naked eye, the article had lost the distinctive character required by the terms of the written contract, to wit, that of being "oxalic acid."

*Josling v. Kingsford.*

So, on the other hand, where the sold note in writing was silent as to quality, the buyer was not permitted by Lord Ellenborough<sup>4</sup> to show that a sample had been exhibited to him before he bought, because it was not a sale "by sample."

*Meyer v. Everth.*

In the recent case of *Carter v. Crick*,<sup>5</sup> the sale was by sample of an article which the vendor called seed barley, but said he did not know what it really was, and the bulk corresponded with the sample. *Held*, that the buyer took at his own risk, whether it was seed barley or some other kind of barley, the vendor's warranty being confined to a correspondence between the bulk and the sample.

*Carter v. Crick.*

In *Russell v. Nicolopulo*,<sup>6</sup> there was a written sale in

*Russell v. Nicolopulo.*

<sup>1</sup> 4 Camp. 144.

<sup>2</sup> 2 Bing. N. C. 668.

<sup>3</sup> 13 C. B., N. S. 447; 32 L. J., C. P. 94.

<sup>4</sup> *Meyer v. Everth*, 4 Camp. 22.

<sup>5</sup> 4 H. & N. 412; 28 L. J., Ex. 238.

<sup>6</sup> 8 C. B., N. S. 362.

London of a cargo of wheat then lying in Queenstown, which closed with these words: "The above cargo is accepted on the report and samples of Messrs. Scott and Co., of Queenstown." Mellish, in arguing a demurrer to the declaration, insisted that this clause only warranted that the report of Scott and Co. was a genuine report, and the samples the genuine samples taken by them, but was not a warranty either that the statements in the report were true, or that the cargo was equal to the samples. But all the judges held that the true meaning of the clause was that the samples shown to the buyer were really samples drawn from the cargo, as represented in the report of Scott and Co., and that the bulk corresponded with the samples so drawn.

Warranty implied from usage.

Jones v. Bowden.

An implied warranty may result from the usage of a particular trade. Thus, in *Jones v. Bowden*,<sup>1</sup> it was shown that in auction sales of certain drugs, as pimento, it was usual to state in the catalogue whether they were sea-damaged or not, and in the absence of a statement that they were sea-damaged, they would be assumed to be free from that defect. The Court held on this evidence that freedom from sea-damage was an implied warranty in the sale.

Weall v. King.

And Heath, J., in that case mentioned a *Nisi Prius* decision by himself, that where sheep were sold as stock, there was an implied warranty that they were sound, proof having been given that such was the custom of the trade; and said that this ruling was not questioned when the case was argued before the King's Bench. The case referred to by the learned judge was probably *Weall v. King*,<sup>2</sup> decided on a different point.

Sale of goods by description not inspected by buyer, implied warranty that they are saleable.

Gardiner v. Gray.

In a sale of goods by description, where the buyer has not inspected the goods, there is, in addition to the *condition precedent* that the goods shall answer the description, an *implied warranty* that they shall be saleable or merchantable. The rule was first clearly stated by Lord Ellenborough, in *Gardiner v. Gray*,<sup>3</sup> where the defendant made a

<sup>1</sup> 4 Taunt. 847.

<sup>2</sup> 12 East, 452.

<sup>3</sup> 4 Camp. 144.

sale of twelve bags of "waste silk." The declaration contained a count alleging a sale by sample, but on this the proof failed. There were other counts, charging the promise to be that the silk should be of a good and merchantable quality. Lord Ellenborough said: "Under such circumstances the purchaser has a right to expect a *saleable article*, answering the description in the contract. Without any particular warranty, this is an *implied term* in every such contract. *Where there is no opportunity to inspect the commodity, the maxim of caveat emptor does not apply.* He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be *saleable in the market* under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill."

This rule has been followed in a long series of decisions,<sup>1</sup> and the law on the subject has just been reviewed, and the cases classified, in *Jones v. Just*,<sup>2</sup> decided in the Queen's Bench, in February, 1868. The plaintiffs in that case bought from the defendant certain "bales Manilla hemp," expected to arrive on ships named. The vessels arrived, and the hemp was delivered, damaged, so as to be unmerchantable, but being still properly described as Manilla hemp. *Held*, that the vendors were liable, and that in such a sale the goods must not only answer the description, but must be saleable or merchantable under that description. Mellor, J., in delivering the judgment, reviewed the whole of the decisions, giving this as the result: "The cases which bear on the subject do not appear to be in conflict when the circumstances of each are considered. They may, we think, be classified as follows: *First*.—Where goods are *in esse*, and may be inspected by the buyer, and there is no

<sup>1</sup> *Jones v. Bright*, 5 Bing. 533; *Ex. 439*; *Bigge v. Parkinson*, 7 H. Laing v. Fidgeon, 4 Camp. 169; 6 & N. 955; 31 L. J., Ex. 301, in Cam. Taunt. 108; *Brown v. Edgington*, Scacc. 2 M. & G. 279; *Shepherd v. Pybus*, 3 M. & G. 868; *Camac v. Warriner*, 1 C. B. 356; *Stancliffe v. Clarke*, 7

<sup>2</sup> L. R. 3, Q. B. 197; 37 L. J., Q. B.

fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor manufacturer (*Parkinson v. Lee*, 2 East, 814). The buyer in such a case has the opportunity of exercising his judgment upon the matter: and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may if he chooses require a warranty. In such a case it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable. So in the case of a sale in the market of meat, which the buyer had inspected, but which was in fact diseased, and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, it was held that there was no implied warranty that it was fit for food, and that the maxim, *caveat emptor*, applied. *Emmerton v. Matthews*, 7 H. & N. 586; 31 L. J., Ex. 139.

*Secondly*.—Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty. *Barr v. Gibson*, 3 M. & N. 390.

*Thirdly*.—Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288.

*Fourthly*.—Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. *Brown v. Edgington*, 2 M. & G. 279; *Jones v. Bright*, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own.

*Fifthly*.—Where a manufacturer under-

takes to supply goods manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article. *Laing v. Fidgeon*, 4 Camp. 169; 6 Taunt. 108. And this doctrine has been held to apply to the sale by the builder of an existing barge, which was afloat, but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use. *Shepherd v. Pybus*, 3 M. & G. 868."

In the same case the learned judge explained the *ratio decidendi* of *Turner v. Mucklow*,<sup>1</sup> decided by himself at Liverpool, in 1862, and in which his ruling had been affirmed by the Exchequer of Pleas. That was a sale of a boat-load of "spent madder," being refuse of madder roots that the vendor had used in dyeing goods, and which lay in a heap in his yard, *open to vendee's inspection* if he chose to avail himself of it. On this ground, and because the vendor did not manufacture it for sale, it was held that there was no implied warranty of quality.

*Turner v. Mucklow.*

But in *Bull v. Robison*,<sup>2</sup> it was held that this warranty only extended to the condition of the goods when they leave the vendor's possession, and that in the absence of express stipulation, he is not liable for any deterioration of quality rendering them unmerchantable at the place of delivery, if such deterioration result necessarily from the transit. The case was that of a sale of hoop iron, to be sent from Staffordshire, the place of making it, to Liverpool, where the buyer ordered it to be delivered in January and February. The iron was clean and bright when it left the vendor's premises to be forwarded by canal boats, vessels, and carts, and was rusted before it reached Liverpool, but not more so than was the necessary result of the transit. Held, that the vendor was not responsible if

*Bull v. Robison.*

Warranty does not extend to necessary depreciation resulting from transit.

<sup>1</sup> 8 Jurist, N. S. 870; 6 L. T., N. S. 690.      <sup>2</sup> 10 Ex. 342; 24 L. J., Ex. 165.

it thereby became unmerchantable when received in Liverpool.

*Gower v. Van Dedalzen.*

Warranty does not extend to the packages.

In *Gower v. Van Dedalzen*,<sup>1</sup> an attempt was made to extend this implied warranty to the packages or vessels in which the merchandize was contained. The dispute arose out of a sale of a cargo of oil, alleged in the declaration to be good merchantable Gallipoli oil, *the said cargo consisting of 240 casks*, and the defendant pleaded that the casks "were not well seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the agreement." On special demurrer, held ill, Tindal, C. J., saying, however, "I can conceive cases in which the state of the receptacle of the article sold might furnish a defence; as if it were a pipe of wine in bottles, with the cork of every bottle oozing: but in such case the plea would be that the wine was not in a merchantable state."

Where article is bought for a particular purpose known to the seller, and buyer relies on the seller's skill.

If a man buy an article for a particular purpose made known to the seller at the time of the contract, and rely upon the skill or judgment of the seller to supply what is wanted, there is an implied warranty that the thing sold will be fit for the desired purpose; *aliter* if the buyer purchases on his own judgment.

*Brown v. Edgington.*

This rule was stated by Tindal, C. J., in *Brown v. Edgington*,<sup>2</sup> to be the result of the authorities as they then stood.

*Jones v. Bright.*

*Jones v. Bright*<sup>3</sup> had previously settled the rule that a manufacturer impliedly warranted an article sold by him to be fit for the purpose stated by the buyer to be intended; and *Chanter v. Hopkins*<sup>4</sup> had settled that where the buyer had bought a specific article from the manufacturer on his own judgment, believing it would answer a particular purpose, he was bound to pay for it although disappointed in the intended use of it. In *Brown v. Edgington*,<sup>5</sup> the judges all intimated that there was no difference in the case

*Chanter v. Hopkins.*

<sup>1</sup> 3 Bing. N. C. 717.

<sup>2</sup> 2 M. & G. 279.

<sup>3</sup> 5 Bing. 533.

<sup>4</sup> 4 M. & W. 399; followed by the

Q. B. in *Ollivant v. Bayley*, 5 Q. B. 288.

<sup>5</sup> See, also, *Laing v. Fidgeon*, 6

Taunt. 108; *Gray v. Cox*, 4 B. & C.

of a sale by a manufacturer or any other vendor in such cases, but the point was not necessary to the decision of the controversy then before the Court, for the vendor had undertaken to have the goods manufactured for the purpose needed by the buyer.<sup>1</sup>

In *Shepherd v. Pybus*,<sup>2</sup> where the sale was of a barge by the *builder*, although the purchaser had inspected it after it was built, yet as he had had no opportunity of inspecting it during its progress, it was held that there was an implied warranty by the vendor, as the manufacturer, against such defects, not apparent by inspection, as rendered the barge unfit for use as an ordinary barge,<sup>3</sup> but that there was no implied warranty that the barge was fit for the precise use for which the buyer intended it, but which was not communicated by him to the vendor. In this case the reporter states that it was proved that the defendant *knew* the purpose for which the plaintiff wanted the barge (p. 871), but Tindal, C. J., said in the judgment, that there was not "any evidence of distinct notice or of a declaration to the defendant at the time the plaintiff inspected the barge or entered into the contract, of the precise service or use for which the barge was purchased by the plaintiff."

Next came *Burnby v. Bollett*<sup>4</sup> in 1847. The defendant, a farmer, bought a pig exposed for sale by a butcher: the plaintiff, another farmer, went to the defendant and offered to purchase the pig which the latter had just bought, and the sale was made without any express warranty. The meat turned out to be diseased, and it was held that there was no implied warranty that it was fit for food (although the vendor must have known it was intended for that purpose), because the vendor was *not a dealer* in meat, did not know that it was unfit for food, and the case was not that of a person to whom an order is sent and who is bound

108; *Okell v. Smith*, 1 Stark. 107; *Gardiner v. Gray*, 4 Camp. 144; *Blunett v. Osborne*, 1 Stark. 384.

<sup>1</sup> *Ante*, p. 488, note 5.

<sup>2</sup> 3 M. & G. 868.

<sup>3</sup> See, also, *Camac v. Warriner*, 1 C. B. 356.

<sup>4</sup> 16 M. & W. 644.



to supply a good and merchantable article. Here, plainly, the purchaser bought on his own judgment.

Emmerton v.  
Matthews.

In 1862, *Emmerton v. Matthews*<sup>1</sup> was decided in the same court, where the vendor *was* a general dealer. The defendant was a salesman in Newgate Street, selling, on commission, meat consigned to him, and the plaintiff was a butcher or retailer of meat. The plaintiff bought a carcass from the defendant, which appeared to be good meat. The plaintiff saw it exposed for sale, bought it on his own inspection, and there was no warranty. The defect was such that it could not be detected till the meat was cooked, and then it proved to be unfit for human food. The Court held, that there was no implied warranty, the sale being of a specific article, the buyer having had an opportunity to examine and select it. Here, again, the purchaser bought the specific chattel on his own judgment.

Bigge v. Park-  
inson.

In the same year the case of *Bigge v. Parkinson*<sup>2</sup> was decided in the Exchequer Chamber, the Court being composed of Cockburn, C. J., and Wightman, Crompton, Byles, and Keating, JJ. The defendant, a provision dealer, had made a written offer to the plaintiff in these words: "I hereby undertake to supply your ship, the Queen Victoria, to Bombay, with troop stores, viz., dietary, mess utensils, coals, &c., at 6l. 15s. 6d. per head, *guaranteed to pass survey of the Honourable East India Company's officers, and also guarantee the qualities as per invoice.*" The plaintiff accepted this offer, which was made under an advertisement in which the plaintiff invited tenders for the supply of provisions and stores for troops which he had contracted with the East India Company to convey from London to Bombay. It was contended by the defendant, *first*, that the express warranty in the contract excluded any implied warranty; but this was overruled, the Court holding it to be an express condition annexed to the ordinary implied warranty, for the benefit of the buyer, to guard himself against any rejection of the goods by the officers of the East

<sup>1</sup> 7 H. & N. 586; 31 L. J., Ex. 139.

<sup>2</sup> 7 H. & N. 955; 31 L. J., Ex. 301. Cam. Scaoc.

India Company: *secondly*, that there was no warranty implied by law in such a sale; but the Court held that the rule now under consideration (and which was quoted from Chitty on Contracts<sup>1</sup>) is the correct rule of law, and that "where a buyer buys a specific article, the rule *caveat emptor* applies, but where the buyer orders goods to be supplied and trusts to the judgment of the sellers to select the goods which shall be applicable to the purpose for which they are intended, which is known to both the parties, \* \* \* there is an implied warranty that they are fit for that purpose; and there is no reason why such a warranty should not be implied in the case of a sale of provisions."

In *Macfarlane v. Taylor*,<sup>2</sup> which was a Scotch appeal, the House of Lords decided, under the 5th section of the Act 19 & 20 Vict. c. 60, which places the law of Scotland upon this subject on the same footing as our own, that a vendor was responsible in damages under the following facts. Taylor and Co., bought of Macfarlane and Co., distillers, of Glasgow, a quantity of spirits, intended by the purchasers to be used in barter with the natives on the coast of Africa, which purpose was communicated to the distillers, and they agreed to give to the spirits a specified shade of colour, to make them resemble rum. In producing this colour they made use of logwood, which, although not proved to cause any positive injury to health, dyed the secretions of those drinking it, so as to make them of the colour of blood, and so to alarm the natives that the spirits were unsaleable. Held, that this was a breach of the implied warranty that the goods should be fit for the specified purpose.

But to this general rule there is this exception, that no warranty is implied where the parties have expressed in words, or by acts, the warranty by which they mean to be bound. Thus, in the early leading case of *Parkinson v. Lee*,<sup>3</sup> where the goods were hops, sold by a fresh sample

*Macfarlane v. Taylor.*

Implied, excluded where there is an express warranty.  
*Parkinson v. Lee.*

<sup>1</sup> P. 418, 8th ed.

<sup>2</sup> L. R. 1, Scotch App. 245.

<sup>3</sup> 2 East, 314.

Dickson v.  
Zizania.

drawn from the bulk, it was held that the warranty resulting from the sale by sample, and which was satisfied when the bulk equalled the sample, could not be supplemented by a further implied warranty that the goods were merchantable. And in *Dickson v. Zizania*,<sup>1</sup> where there was an express warranty that a cargo of Indian corn should be equal to the average of the shipments of Salonica, of that season, and should be shipped in good and merchantable condition; it was held that this warranty could not be extended by implication, so as to make the vendor answerable that the corn was in a good and merchantable condition *for a foreign voyage*, although the contract stated that the corn was bought for that purpose. "*Expressum facit cessare tacitum.*"

This warranty  
not implied in  
favour of third  
persons.  
*Longmeid v.*  
*Holliday.*

Before leaving this point the case of *Longmeid v. Holliday*<sup>2</sup> must be noticed. It was an attempt to make a vendor responsible to a third person, the wife of the purchaser, for injury resulting from the bursting of a lamp, alleged not to be fit for the purpose for which it was bought. The jury negatived fraud on the part of the vendor, or any knowledge that the lamp was unfit for use. The case was put on the ground of a breach of duty in the shop-keeper in selling a dangerous article, which was said to give a right of action in favour of any person injured by its use, though not a party to the contract. But the Court held that the action was not maintainable, unless the facts showed such a fraudulent or deceitful representation as would bring it within the authority of *Langridge v. Levy*,<sup>3</sup> referred to, *ante*, p. 316, such action by third persons being an action of *deceit*, founded on *tort*, and not on *contract*.

Existence of  
thing sold not  
properly an  
implied war-  
ranty, but a  
condition.

It is said that there is an implied warranty that the subject-matter of the sale exists, and is capable of transfer to the purchaser, but this seems rather to come under the definition of a condition precedent than a warranty, for clearly it is not *collateral* to a contract of sale that there should be a subject-matter on which it can take effect. The cases

<sup>1</sup> 10 C. B. 602; 20 L. J., C. P. 72.

<sup>2</sup> 6 Exch. 761.

<sup>3</sup> 2 M. & W. 519.

have already been referred to, *ante*, Book I., Part 1, Ch. 4, of the Thing Sold.

Blackstone says,<sup>1</sup> in contracts for provisions it is always implied that they are wholesome, and that if they be not, an *action on the case for deceit* lies against the vendor. He gives no authority, and the proposition clearly assumes knowledge of the unwholesomeness on the part of the vendor, for that knowledge is an essential element in the action for deceit, as settled in *Pasley v. Freeman*,<sup>2</sup> and the cases there cited, and others which have since been determined on its authority. In *Chitty on Contracts*,<sup>3</sup> the learned author says, that "it appears that in contracts for the sale of *provisions*, by dealers and common traders in provisions, there is an implied warranty that they are wholesome." The above-quoted passage, from Blackstone, is given as the authority for this statement, and in the note it is suggested that *Emmerton v. Matthews*,<sup>4</sup> so far as it contradicts this proposition, is not law.

Is there an implied warranty in sales of provisions, &c.?

In *Burnby v. Bollett*,<sup>5</sup> however, all the old authorities are collected, and were cited in argument, and Rolfe, B., said, that the cases in the Year Books turned on the *scienter* of the seller, or on the peculiar duty of a taverner. In rendering judgment in that case, the point decided was, that the farmer who sold the pig was not liable on an implied warranty, because none of the authorities suggested the existence of such a warranty except in cases of "victuallers, butchers, and other common dealers in victuals;" but Parke, B., intimated quite plainly that in his opinion the general proposition was not maintainable. The notion of an implied warranty in such cases appears to be an untenable inference from the old statutes which make the sale of unsound food punishable. The learned Baron after explaining this, said: "The statute 51 Henry III., of the Pillory and Tumbril, and Assize of Bread and Ale, applies only to vintners, brewers, butchers, and cooks. Amongst

*Burnby v. Bollett.*

<sup>1</sup> Vol. 3, p. 166.

<sup>4</sup> 7 H. & N. 586; 31 L. J., Ex. 139.

<sup>2</sup> 3 T. R. 51, and 2 Sm. L. C. 71.

<sup>5</sup> 16 M. & W. 644.

<sup>3</sup> P. 418 (8th ed.).

other things, inquiry is to be made of the vintners' names, and how they sell a gallon of wine, or if any corrupted wine be in the town, or such as is not wholesome for man's body; and if any butcher sells contagious flesh, or that died of the murrain, or cooks that seethe unwholesome flesh, &c. Lord Coke goes on to say, that Britton, who wrote after the statute 51 Henry III., and following the same, saith: 'Puis soit inquire de ceux queux achatent per un manner de mesure et vendent per meinder mesure faux, et ceux sont punis come vendors des vines, et auxi ceux que serront atteint de faux aunes, et faux poys, et auxi les macegrievs (macellarii,<sup>1</sup> butchers), et les gents que de usage vendent a tres-passants (passengers) mauvaise vians corrupus et wacrus et autrement perillous a la saunty de home, encountre le forme de nous statutes.'

"This view of the case explains what is said in the Year Book, 9 Hen. VI. 58, that 'the warranty is not to the purpose, for it is *ordained* that none shall sell corrupt victuals;' and what is said by Tanfield, C. B., and Altham, B., Cro. Jac. 197, 'that if a man sell corrupt victuals without warranty, an action lies, because it is against *the commonwealth*;' and also explains the note of Lord Hale, in 1st Fitzherbert's Natura Brevium, 94, that there is diversity between selling corrupt wines as *merchandise*, for there an action on the case does not lie without warranty; otherwise, if it be for a taverner or victualler, *if it prejudice any*.'" <sup>2</sup>

It is submitted that it results clearly from these authorities, that the responsibility of a victualler, vintner, brewer, butcher, or cook, for selling unwholesome food does not arise out of any contract or implied warranty, but is a responsibility imposed by statute,<sup>3</sup> that they shall make good any *damage caused* by their sale of unwholesome food. *Emmerton v. Matthews*, therefore, when applying the maxim

<sup>1</sup> Macellarii, rather, sellers of meat in shambles; but "macegrievs," by Termes de la Ley, means those who sell *wittingly* stolen meat.

<sup>2</sup> See, also, remarks of Mellor, J., on *Emmerton v. Matthews*, *ante*,

p. 486.

<sup>3</sup> All the old statutes referred to by Parke, B., and many others of a similar kind, were swept away by the Repealing Act, 7 & 8 Vict. c. 24.

of *caveat emptor* to the sale of an article of food, even when the vendor is a general dealer, if the buyer has bought on his own judgment, without express warranty, does not seem to be at all in contradiction with the earlier authorities, as explained in *Burnby v. Bollett*, by Parke, B.

An implied warranty has been imposed on the vendor in certain sales by the "Merchandise Marks Act, 1862" (25 & 26 Vict. c. 88), of which the 19th and 20th sections are in the following language :—

Implied warranty from marks on packages.  
25 & 26 Vict. c. 88.

"In every case in which at any time after the thirty-first day of December, one thousand eight hundred and sixty-three, any person shall sell, or contract to sell (whether by writing or not), to any other person any chattel or article with any trade mark thereon, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold or contracted to be sold, the sale or contract to sell shall in every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that every trade mark upon such chattel or article, or upon any such cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing as aforesaid, was genuine and true, and not forged or counterfeited, and not wrongfully used, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee.

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"In every case in which at any time after the thirty-first day of December, one thousand eight hundred and sixty-three, any person shall sell or contract to sell (whether by writing or not), to any other person any chattel or article upon which, or upon any cask, bottle, stopper, vessel, case, cover, wrapper, band, reel, ticket, label, or other thing together with which such chattel or article shall be sold, or contracted to be sold, any description, statement, or other indication of or respecting the number, quantity, measure, or weight of such chattel or article, or the place or country in which such chattel or article shall have been made, manufactured, or produced, the sale or contract to sell shall in

Sect. 20.

every such case be deemed to have been made with a warranty or contract by the vendor to or with the vendee that no such description, statement, or other indication was in any material respect false or untrue, unless the contrary shall be expressed in some writing signed by or on behalf of the vendor, and delivered to and accepted by the vendee."

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## CHAPTER II.

### DELIVERY.

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AFTER the contract of sale has been completed, the chief and immediate duty of the vendor, in the absence of contrary stipulations, is to deliver the goods to the purchaser as soon as the latter has complied with the conditions precedent, if any, incumbent on him.

There is no branch of the law of sale more confusing to the student than that of delivery. This results from the fact that the word is unfortunately used in very different senses, and unless these different significations are carefully borne in mind, the decisions would furnish no clue to a clear perception of principles.



*First.*—The word delivery is sometimes used with reference to the passing of *the property in* the chattel,<sup>1</sup> sometimes to the change of *the possession of* the chattel: in a word, it is used in turn to denote transfer of *title*, or transfer of *possession*.

*Secondly.*—Even where “delivery” is used to signify the transfer of *possession*, it will be found that it is employed in two distinct classes of cases, one having reference to the *formation* of the contract; the other, to the *performance* of the contract. When questions arise as to the “actual receipt” which is necessary to give validity to a parol contract for the sale of chattels exceeding 10*l.* in value, the judges constantly use the word “delivery” as the correlative of that “actual receipt.” After the sale has been proven to *exist*, by delivery and actual receipt, there may arise a second and distinct controversy upon the point whether the vendor has *performed* his completed bargain by delivery of possession of the bulk to the purchaser.

*Thirdly.*—Even when the subject under consideration is the vendor’s delivery of possession in *performance* of his contract, there arises a fresh source of confusion in the different meanings attached to the word “possession.” In general it would be perfectly proper, and even technical, to speak of the buyer of goods on credit as being in possession of them, although the actual custody may have been left with the vendor. The buyer owns the goods, has the right of possession, may take them away, sell or dispose of them at his pleasure, and maintain trover for them. Yet, if he become insolvent, the vendor is said to have retained possession. Again, if the vendor has delivered the goods to a carrier for conveyance to the purchaser, he is said to have lost his lien, because the goods are in the buyer’s possession, the carrier being the agent of the buyer; but if the vendor claim to exercise the right of stoppage *in transitu*, while the carrier is conveying them, the goods are said to be

<sup>1</sup> As for instance, in the opinion of Parke, J., in *Dixon v. Yates*, 5 B. & Ad., at p. 340.

only in the *constructive*, not in the *actual possession* of the buyer.

Delivery in the sense of a transfer of *title* has been considered, *ante*, Book II., Of the Effect of the Contract.

Delivery of *possession*, as required under the Statute of Frauds, as the correlative of the buyer's "actual receipt" in order to prove the *formation* of the contract, has been considered in Book I. Part 2, Ch. 4, Of Acceptance and Actual Receipt.

Delivery into the buyer's possession, sufficient to destroy the vendor's lien, or even his right of stoppage *in transitu*, will be discussed *post*, Book V.

This chapter is confined to a consideration of the vendor's duty of delivering the goods in *performance* of his contract, so as to enable him to defend an action by the buyer for non-delivery.

Generally the purchaser in a bargain and sale of goods, where the property has passed, is entitled to take possession of them, and it is the vendor's duty to deliver this possession. But this right is only *primâ facie*, and it may well be bargained that the possession shall remain with the vendor until the fulfilment of certain conditions precedent by the purchaser. Where nothing has been said as to payment, the law presumes that the parties intended to make the payment of the price and the delivery of the possession concurrent conditions, as is explained in Book IV. Part 1, On Conditions. The vendor cannot insist on payment of the price without alleging that he is ready and willing to deliver the goods; the buyer cannot demand delivery of the goods without alleging that he is ready and willing to pay the price. But it constantly happens that there is a stipulation to the contrary of this, and that the parties agree that the buyer is to take possession of the goods before paying for them, or in the usual phrase, that the goods are sold on credit. The legal effect then is, that there has been an actual transfer of *title*, and an actual transfer of the *right of possession* by the bargain, so that in pleading, and for all purposes, save that of the vendor's lien for the price, the

Vendor's duty to deliver is only *primâ facie*, and may depend on conditions.

Delivery conditional on payment.

Effect of sale on credit is to pass title and *right of possession*.

Vendor may  
refuse delivery,  
notwithstanding  
this right,  
on vendee's in-  
solvency.

Bloxam v.  
Sanders.

buyer is considered as being in possession, by virtue of the general rule of law that "the property of personal chattels draws to it the possession."<sup>1</sup> But although the buyer has thus acquired the *right of possession* not to be questioned for any legal purpose by any one save his vendor, the latter may refuse to part with the goods, and may exercise his lien as vendor to secure payment of the price, if the purchaser has *become insolvent* before obtaining *actual* possession. The law on this whole subject was very perspicuously stated in the case of *Bloxam v. Sanders*,<sup>2</sup> which may be considered the leading case, always cited when these points are under discussion. The decision turned upon the following facts:—One Saxby bought several parcels of hops of the defendants in August, 1823, the bought notes being as follows: "Mr. J. R. Saxby, of Sanders, eight pockets, at 155s. 8th August, 1823." Part of the hops were weighed, and an account delivered to Saxby of the weights; and samples were given to Saxby, and invoices delivered, in which he was made debtor for six different parcels, amounting to 739l. The usual time of payment in the trade was the second Saturday subsequent to a purchase. Saxby did not pay for the hops, and on the 6th September the defendants wrote to him a notice that if he did not pay for them before the next Tuesday they would resell and hold him bound for any deficiency in price. They did accordingly resell some parcels with Saxby's express assent, and refused to deliver another parcel (that Saxby himself sold) without being paid. Saxby became bankrupt in November, and the defendants sold other hops afterwards on his account, and delivered account sales of them, charging him commissions, and *warehouse rent from the 30th August*. The plaintiffs were assignees of the bankrupt, and they demanded of the defendants the hops remaining in their hands, tendering at the same time the warehouse rent and charges; and the action was trover not only for the hops remaining unsold, but for the proceeds of all those resold by the defendants

<sup>1</sup> 2 Wms. Saunders, 47, n. 1.

<sup>2</sup> 4 B. & C. 941.

after Saxby's failure to pay. Bayley, J., delivered the judgment. He said: "Where goods are sold, and nothing is said as to the time of the delivery, or the time of payment, and every thing the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded, *upon payment of the price*: but the buyer has no right to have possession of the goods *till he pays the price*. The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment or a tender of the price is a *condition precedent* on the buyer's part; and until he makes such payment or tender, he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the *right of possession* and the *right of property* vest at once in him: but his *right of possession* is not absolute; it is liable to be defeated if he becomes insolvent before he *obtains* possession. *Tooke v. Hollingworth*, 5 T. R. 215. Whether default in payment when the credit expires will destroy his *right of possession*, if he has not before that time obtained *actual possession*, it is not now necessary to enquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly clear. *Hanson v. Meyer*, 6 East, 614. If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*.<sup>1</sup> Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an *indefeasible right to the possession*, and his insolvency without payment of the price defeats that right. And if this be the case after he has despatched the goods, and whilst they are *in transitu*, *à fortiori* is it, where he has

<sup>1</sup> *Mason v. Lickbarrow*, 1 H. Bl. 357; *Ellis v. Hunt*, 3 T. R. 464; *Hodgson v. Loy*, 7 T. R. 440; *Usherwood v. Ingis*, 3 East, 381; *Bohtlingk v. Ingis*, 3 East, 381.

never parted with the goods, and where no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or *they may still act upon their right of PROPERTY if any thing unwarrantable is done to that right*. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are *both* requisite, unless they have both those rights. *Gordon v. Harper*, 7 T. R. 9. Trover is an action of that description. It requires right of property and right of possession to support it. And this is an answer to the argument upon the charge of warehouse rent, and the non-rescinding of the sale. If the defendants were forced to keep the hops in their warehouse longer than Saxby had a right to require them, they were entitled to charge him with that expense, but that charge gave him no better right of possession than he would have had if that charge had not been made. \* \* \* Then, as to the non-rescinding of the sale, what can be its effect? It is nothing more than insisting that the defendants will not release Saxby from the obligation of his purchase, but it will give him no right beyond the right his purchase gave, and that is a right to have the possession on payment of the price."<sup>1</sup>

Keeping in view this lucid exposition of the circumstances under which a vendor may decline delivery of possession, we will now enquire what he is bound to do where no legal ground exists for refusing to deliver.

Vendor bound only to put goods at buyer's disposal, not to send them.

In the absence of a contrary agreement, the vendor is not bound to send or carry the goods to the vendee. He does all that he is bound to do by leaving or placing the goods at the buyer's disposal, so that the latter may remove them without lawful obstruction.

<sup>1</sup> See, also, *per Cur.* in *Spartali v. Benecke*, 10 C. B. 212; 19 L. J., C. P. 293.

In *Salter v. Woollams*,<sup>1</sup> the defendant, an auctioneer, sold a rick of hay, then on the premises of one Jackson, who had given a licence to remove it. The licence was read at the auction, and the auctioneer delivered to the buyer a note addressed to Jackson, requesting him to permit the buyer to remove the hay. Jackson refused, and the buyer brought action for non-delivery; but the Court held that the delivery was complete, the auctioneer having made the only delivery the nature of the case permitted, and Tindal, C. J., said he saw no reason why the buyer could not maintain trover against Jackson.

*Salter v.  
Woollams.*

*Wood v. Manley*<sup>2</sup> was another action growing out of the same sale, of a second rick of hay to another purchaser. The delivery was the same as in the previous case, and the buyer, on Jackson's refusal to let him take the hay, broke open the gate of Jackson's close, and entered and took the hay. Thereupon trespass was brought against the buyer, but the King's Bench held that Jackson's licence was irrevocable,<sup>3</sup> and that the delivery to the buyer by the auctioneer's order was a complete delivery, in performance of his contract.

*Wood v.  
Manley.*

It might seem at first sight that the decision in *Salter v. Woollams*<sup>4</sup> is in conflict with the class of decisions exemplified in *Bentall v. Burn*,<sup>5</sup> and discussed *ante*, pp. 128, et seq., in which the principle is established that there is no delivery where the goods are in possession of a third person, unless that third person assent to attorn to the buyer and become his bailee instead of that of the vendor. But a little reflection will show that there is really no such conflict; for in *Salter v. Woollams*, the third person, although refusing to deliver to the buyer on the vendor's order *after* the sale, had assented *in advance* of the sale to become bailee for any person who might buy, and the Court held this assent not

Observations  
on these cases.

<sup>1</sup> 2 M. & G. 650; and see *Smith v. Chance*, 2 B. & A. 753, for an *incomplete* delivery in a similar sale.

W. 838; and *Taplin v. Florence*, 10 C. B. 765.

<sup>4</sup> 2 M. & G. 650.

<sup>2</sup> 11 Ad. & E. 34.

<sup>5</sup> 3 B. & C. 423.

<sup>3</sup> See *Wood v. Leadbitter*, 13 M. &

to be revocable *after the sale*. The consequence then was, that the third person in possession became, by the completion of the sale, bailee for the buyer, and his refusal to deliver to the buyer was not a refusal to *become* bailee, but to do his duty as bailee, after assenting to assume that character.

Wood v. Tassell.

In *Wood v. Tassell*,<sup>1</sup> the plaintiff sued for non-delivery of certain hops sold to him by the defendant. The hops were parcel of a larger quantity lying at the warehouse of one Fridd, where they had been deposited by a former owner, who sold them to the defendant. After the sale to the plaintiff, he was informed that the hops were at Fridd's, and went there, had them weighed, and took away part. Some days after, when the plaintiff sent for the remainder, they were gone, having been claimed and taken away by a creditor of the defendant's vendor. Held, that the defendant had done all that he was bound to do in making delivery, and was not responsible.

In this case it is worth remarking that Lord Denman, in delivering the judgment, said: "I was induced by some degree of importunity to leave it as a question to the jury whether the defendant ought not to have given the plaintiff a delivery order, though not expressly required, in performance of his contract. We all think that I was wrong in so submitting the matter to them, and that the correct course would have been to direct them that under the circumstances Fridd held the hops as agent for the plaintiff."

Place of delivery.

As to the *place* where delivery is to be made, when nothing is said about it in the bargain, it seems to be taken for granted almost universally, that the goods are to be at the buyer's disposal, at the place where they are when sold. No cases have been met with on this point. Lord Coke says:<sup>2</sup> "If the condition of a bond or feoffment be to deliver twenty quarters of wheat or twenty loads of timber, or such like, the obligor or feoffor is not bound to carry the same about and seek the feoffee, but the obligor or feoffor

<sup>1</sup> 6 Q. B. 234.

<sup>2</sup> Co. Lit. 210 b.

before the day must go to the feoffee and know where he will appoint to receive it, and there it must be delivered." But this refers to estates held upon condition and to the duty of a *debtor*, and is not applicable to cases where the party bound to deliver, as a vendor, is only held to the obligation of keeping the thing at the disposal of the buyer, and is not bound to more than a *passive* readiness to allow the buyer to take the goods. Kent says:<sup>1</sup> "If no place be designated by the contract, the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay upon demand and is silent as to the place." This appears to be a very reasonable rule, and it would of course result as a consequence that the vendor would be responsible for removing the goods before delivery to a place where the buyer would be subjected to inconvenience or increased expense in taking possession of them.

If, however, the contract impose on the vendor the obligation of sending the goods, questions may arise as to the time and manner in which he is to fulfil this duty. If nothing is said as to time, he must send within a *reasonable time*; and when the sale is in writing, if nothing is said as to time, parol evidence is admissible of the facts and circumstances attending the sale in order to determine what is a reasonable time.

Vendor's duty when he agrees to send goods.

Where time is not expressed in contract, reasonable time.

Thus in *Ellis v. Thompson*,<sup>2</sup> where there was a sale of lead, deliverable in London, parol evidence was admitted to show that the defendant had asked the broker whether the lead was ready for shipment, and had been informed that it was, before the bought and sold notes were made out. And it was held that the defendant was relieved from the obligation of receiving delivery by reason of a long delay in

*Ellis v. Thompson*.

<sup>1</sup> Vol. 2, p. 677 (11th ed.).

*v. Gibbon*, 8 Ex. 920; *Sansom v.*

<sup>2</sup> 3 M. & W. 445; and see *Jones*

*Rhodes*, 8 Scott, 544.



getting the lead in barges from the mine down the Severn to Gloucester, from which port it was to be shipped to London.

Where the contract expresses the time.

But where the contract expresses the time, the question is one of construction, and therefore one of law for the Court, not of fact for the jury.

"Month," its meaning.

The word "month," although at common law it generally means a *lunar* month, is in mercantile contracts understood to mean a *calendar* month.<sup>1</sup> And the Court will look at the context in all cases, to see whether a calendar month was not intended, and if so, will adopt that construction.<sup>2</sup>

Stat. 13 Vict. c. 21, s. 4.

And now by statute 13 Vict. c. 21, s. 4, it is enacted, that "in all Acts the word 'month' shall be taken to mean calendar months, unless words be added, showing lunar months to be intended."

"Days," how counted.

Where a certain number of "days" is to be allowed for the delivery, they are to be counted as consecutive days, and include Sundays, unless the contrary be expressed,<sup>3</sup> or an usage to that effect be shown.<sup>4</sup>

And the rule, though long in doubt, seems now to be settled by the decision in *Webb v. Fairman*,<sup>5</sup> that if a certain number of days is allowed for the delivery, they must be counted exclusively of the day of the contract. A promise to deliver goods in two months from the 5th October, is fulfilled by delivery at any time on the whole day of the 5th December, so that an action against the vendor would be premature, if brought before the 6th.

"Hour."

In relation to the *hour* up to which a vendor can make a valid delivery, on the last day fixed by the contract, the whole subject is fully discussed, in the carefully considered case of *Startup v. M'Donald*,<sup>6</sup> in *Cam. Scac.*

*Startup v. McDonald.*

In that case the plaintiff had sold to the defendant ten

<sup>1</sup> *Reg. v. Chawton*, 1 Q. B. 247; 331.

*Hart v. Middleton*, 2 C. & K. 9;

*Webb v. Fairman*, 8 M. & W. 473.

<sup>2</sup> *Simpson v. Margitson*, 11 Q. B.

23; *Webb v. Fairman*, 3 M. & W.

473.

<sup>3</sup> *Brown v. Johnson*, 19 M. & W.

<sup>4</sup> *Cochran v. Retberg*, 3 Esp. 121.

<sup>5</sup> 3 M. & W. 473; and see *Lester*

*v. Garland*, 15 Vesey, 247; *Pellow v.*

*Wonford*, 9 B. & C. 134.

<sup>6</sup> 6 M. & G. 593.

tons of linseed oil, "to be free delivered within the last fourteen days of March, and paid for at the expiration of that time, in cash." The defendant pleaded to an action for not receiving the oil, that the tender was made on the last of the fourteen days, at nine o'clock at night, which was an unreasonable and improper time, &c., &c. The jury found as a special verdict, that the plaintiff made the tender at half past eight o'clock at night of the 31st March, that day being *Saturday*, that there was full time before twelve o'clock at night for the defendants to examine, and weigh, and receive the oil, but that he objected on the ground that the tender was at an *unreasonable hour*; that the plaintiff then kept the oil, and tendered it again on Monday morning, at seven o'clock; and that the hour of half past eight on Saturday night was an *unreasonable and improper time of that day* for the tender and delivery of the oil. On these facts the Court of Common Pleas had been unanimous in favour of the defendant,<sup>1</sup> but the judgment was reversed in Cam. Scac. The Judges, Denman, C. J., Abinger, C. B., Patteson, and Williams, JJ., and Parke, Gurney, Rolfe, and Alderson, BB., were unanimous in opinion that the defendant was not bound to be present at the hour when the tender was made; but all were also of opinion (with the exception of Lord Denman, who dissented), that *being there*, he was bound by the tender; and that the verdict of the jury, declaring that the tender was at an unreasonable and improper time, was an erroneous finding of the *law*, inconsistent with their finding of the *fact* that the tender was made in full time for the defendant to examine, weigh, and receive the oil, before midnight. Parke, B., gave an instructive statement of the whole law on the subject, in these words: "The question in this case is merely, what is the proper time of the day for a tender of goods, under a contract to sell and deliver to another within a certain number of days, the mode of tender being in other respects reasonable and proper (for it is found to be unreasonable only in respect of

<sup>1</sup> 2 M. & G. 395.

the *lateness*), the tender being made to the *vendee personally*, and there being no usage of trade as to the time for delivery, to qualify or explain the contract. \* \* \* Upon a reference to the authorities, and due consideration of them, it appears to me that there is no doubt upon this question. *It is not to be left to a jury* to be determined as a question of practical convenience or reasonableness in each case, but the *law appears to have fixed the rule*, and it is this, that a party who is by contract to pay money or to do a thing *transitory* to another, anywhere, on a certain day, has the whole of the day, and if on one of several days, the whole of the days for the performance of his part of the contract; and until the whole day, or the whole of the last day has expired, no action will lie against him for the breach of such contract. In such a case, the party bound must find the other at his peril (*Kidwelly v. Brand*, Plowden, 71), and within the time limited if the other be within the four seas (*Shepp*. 136, Ed. 1651), and he must do all, that, without the concurrence of the other, he can do, to make the payment, or perform the act; and that at a convenient time *before midnight*, such time varying according to the quantum of the payment or nature of the act to be done. Therefore, if he is to pay a sum of money, he must tender it a sufficient time before midnight for the party to whom the tender is made to receive and count; or if he is to deliver goods, he must tender them so as to allow sufficient time for examination and receipt. This done, he has, so far as he could, paid or delivered within the time; and it is by the fault of the other only that the payment or delivery is not complete.

“But where the thing is to be performed *at a certain place*, on or before a certain day to another party to a contract, there the tender must be to the other party, *at that place*; and as the attendance of the other party is necessary at that place to complete the act, there the law, though it requires that other to be present, is not so unreasonable as to require him to be present for the whole day where the thing is to be done on one day, or for the whole series of days

where it is to be done on or before a day certain: and, therefore, it fixes a particular part of the day for his presence; *and it is enough if he be at the place at such a convenient time before sunset on the last day, as that the act may be completed by daylight*; and if the party bound tender to the party there, if present, or if absent, be ready at the place to perform the act within a convenient time before sunset for its completion, it is sufficient; and if the tender be made *to the other party, at the place at any time of the day*, the contract is performed; and though the law gives the uttermost convenient time on the last day, yet this is solely for the convenience of both parties, that neither may give longer attendance than is necessary; and *if it happen that both parties meet at the place at any other time of the last day*, or upon any other day within the time limited, and a tender is made, the tender is good. See *Bacon's Abr. tit. Tender D. (a); Co. Lit. 202, a.* This is the distinction which prevails in all the cases,—where a thing is to be done *anywhere*, a tender at a convenient time *before midnight* is sufficient; where the thing is to be done at a *particular place*, and where the law implies a duty on the party to whom the thing is to be done to attend, that attendance is to be by daylight, and a convenient time *before sunset*. \* \* \* I therefore think that the tender was good in this case in point of time, and consequently that the plaintiff *having been able to meet with the defendant, and actually to tender the oil to him a sufficient time before midnight to enable the defendant to receive, examine, and weigh the oil, performed as far as he could his part of the contract, and was entitled to recover for the breach of it by the defendant.*"

In *Duncan v. Topham*,<sup>1</sup> the declaration alleged an order for goods to be delivered to the defendant within a *reasonable time*, but the proof showed a written order for "five tons, &c.: but it must be put on board *directly*," to which the plaintiff replied, "I shall ship you five tons, &c., *tomorrow*." Held, that the proof did not support the decla-

*Duncan v.  
Topham.*

Delivery "di-  
rectly."

<sup>1</sup> 8 C. B. 225.

ration; and that a *reasonable time* was a more protracted delay than *directly*.

Attwood v.  
Emery.

"As soon as  
possible."

In *Attwood v. Emery*,<sup>1</sup> the agreement of the vendor, who was a *manufacturer*, to deliver goods "as soon as possible," was construed to mean "as soon as the *vendors* could," with reference to *their* ability to furnish the article ordered, consistently with the execution of prior orders in hand. A written order by a cooper for a large quantity of iron hoops "as soon as possible," sent on the 30th November, was held to be reasonably complied with by tender in the February following.

"Reasonable  
time."

For the meaning of the words *reasonable time*, see *Brighty v. Norton*,<sup>2</sup> and *Toms v. Wilson*,<sup>3</sup> *post*, p. 525.

"Forthwith."

Where the contract was to deliver goods "forthwith," the price being made payable within fourteen days from the making of the contract, it was held manifest that the goods were intended to be delivered within the fourteen days.<sup>4</sup>

Vendor must  
deliver bill of  
lading when  
rightfully de-  
manded, even  
before cargo  
landed.

Barber v.  
Taylor.

Where by the terms of a contract of sale the vendor was to deliver to the purchaser a bill of lading for the cargo which had been bought on the purchaser's orders, it was held that the delivery of the *bill of lading* within a reasonable time after its receipt, and without reference to the unloading of the *cargo*, was incumbent on the vendor, and that the buyer was justified in rejecting the purchase on the refusal to deliver the bill of lading.<sup>5</sup>

Delivery of  
more or of less  
than the con-  
tract requires  
not good.

The vendor does not comply with his contract by the tender or delivery of either more or less than the exact quantity contracted for,<sup>6</sup> or by sending the goods sold mixed with other goods. As a general rule, the buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the vendor has no right to insist upon

<sup>1</sup> 1 C. B., N. S. 110; 26 L. J., C. P. 73.

<sup>2</sup> 3 B. & S. 305; 32 L. J., Q. B. 38.

<sup>3</sup> 4 B. & S. 442, 455; 32 L. J., Q. B. 33-382.

<sup>4</sup> *Stainton v. Wood*, 16 Q. B. 638. See, also, *Roberts v. Brett*, 11 H. of L. C. 337, and 34 L. J., C. P. 241, as to interpretation of "forthwith."

<sup>5</sup> *Barber v. Taylor*, 5 M. & W. 527.

<sup>6</sup> The rule is less rigid where goods are ordered from a correspondent who is an *agent* for buying them. See *Ireland v. Livingstone*, L. R. 2 Q. B. 99; 36 L. J. Q. B. 50; *Johnston v. Kershaw*, L. R. 2 Ex. 82; 36 L. J. Ex. 44.

the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered.

In *Dixon v. Fletcher*,<sup>1</sup> the declaration alleged an order by defendant for the purchase on his account of 200 bales of cotton, and a shipment to him of 206 bales, and the defendant's refusal to receive said cotton, or "any part thereof." The Court allowed the plaintiff to amend his declaration, holding it to be insufficient for want of an averment that the plaintiffs were ready and willing to deliver the 200 bales only.

So in *Hart v. Mills*,<sup>2</sup> where an order was given for two dozen of wine, and four dozen were sent, it was held that the whole might be returned.

In *Cunliffe v. Harrison*,<sup>3</sup> a purchase was made of ten hogsheads of claret, and the vendor sent fifteen. Held, that the contract of the vendor was not performed, "for the person to whom they are sent cannot tell which are the ten that are to be his, and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him."<sup>4</sup>

In *Nicholson v. Bradfield Union*,<sup>5</sup> the plaintiffs, under a contract for the sale of Ruabon coals, sent one lot of 15 tons 9 cwt. of real Ruabon coals on the 1st July, and another lot of 7 tons 8 cwt. of coals, which were not Ruabon coals, on the 2nd July, and the two parcels were shot into one heap, and it was held a bad delivery *for the whole*.

In *Levy v. Green*,<sup>6</sup> the goods ordered were sent, but they were packed in a crate with other goods not ordered, though perfectly distinguishable, the articles in excess being crockery-ware of a different pattern. And Coleridge and Erle, JJ., considered that the case was distinguishable on that ground from the cases already cited; but Campbell, C.J., and Wightman, J., thought it clear that the vendor had no right to

<sup>1</sup> 3 M. & W. 146.

<sup>2</sup> 15 M. & W. 85.

<sup>3</sup> 6 Ex. 903.

<sup>4</sup> *Per* Parke, B.

<sup>5</sup> L. R. 1, Q. B. 620; 35 L. J., Q.

B. 176.

<sup>6</sup> 8 E. & B. 575; 27 L. J., Q. B. 111; in *Cam. Scacc.* 28 L. J., Q. B. 819.

impose on the purchaser the *onus* of unpacking the goods and separating those that he had bought from the others; and this latter view was held right by the unanimous decision of the Exchequer Chamber.

Where the delivery is less than required by the sale.

If, on the other hand, the delivery is of a quantity less than that sold, it may be refused by the purchaser: and if the contract be for a specified quantity to be delivered in parcels from time to time, the purchaser may return the parcels first received, if the later deliveries be not made, for the contract is not performed by the vendor's delivery of less than the whole quantity sold.<sup>1</sup> But the buyer is bound to pay for any part that he accepts; and after the time for delivery has elapsed, he must either return or pay for the part received, and cannot insist on retaining it without payment, until the vendor makes delivery of the rest.

Buyer must pay for what he keeps.

Waddington v. Oliver.

Thus, in *Waddington v. Oliver*,<sup>2</sup> the plaintiff delivered on 12th December twelve bags of hops in part performance of a contract to deliver 100 bags on or before the 1st January, and demanded immediate payment for them, and brought his action on the buyer's refusal. *Held*, that no such action could be maintained *prior* to the expiration of the time fixed for delivery of the remainder.

Oxendale v. Wetherell.

But in *Oxendale v. Wetherell*,<sup>3</sup> the plaintiff was held entitled to recover for 130 bushels of wheat delivered and kept by the buyer on a contract for the sale of 250 bushels, in an action brought *after* the expiration of the time fixed for the delivery of remainder.

Hoare v. Rennie.

In *Hoare v. Rennie*,<sup>4</sup> where the contract was to deliver 667 tons of iron in four equal parts, in four successive months, the vendor having tendered delivery of only 21 tons in the first month, was held to have broken his contract so as to justify the purchaser's rejection of the whole bargain.

Morgan v. Gath.

In *Morgan v. Gath*,<sup>5</sup> the purchase was of 500 piculs of cotton, and only 420 were delivered. The jury having found

<sup>1</sup> *Per* Parke, J., in *Oxendale v. Wetherell*, 9 B. & C. 386.

<sup>2</sup> 2 B. & P., N. R. 61.

<sup>3</sup> 9 B. & C. 386. See, also, *Mavor*

*v. Pyne*, 3 Bing. 285.

<sup>4</sup> 5 H. & N. 19; 29 L. J., Ex. 73.

<sup>5</sup> 3 H. & C. 748; 34 L. J., Ex. 165.

on the facts that the buyer had consented to receive the 420 piculs, and had had them weighed, and accepted them, held that he could no longer object that the whole 500 piculs had not been delivered.

The quantity to be delivered is, however, sometimes stated in the contract with the addition of words, such as "about," or "more or less," which show that the quantity is not restricted to the exact number or amount specified, but that the vendor is to be allowed a certain moderate and reasonable latitude in the performance.

Quantity stated  
"about," so  
much, or  
"more or  
less."

In *Cross v. Eglin*,<sup>1</sup> the purchase was of "about 300 quarters (more or less) of foreign rye, \* \* \* shipped on board the Queen Elizabeth, &c., also about 50 quarters of foreign red wheat, &c., &c." The vessel arrived, having on board 345 quarters of rye, and 91 of wheat. The plaintiffs, the buyers, had paid by bill of exchange for 50 quarters of wheat and 300 quarters of rye; but the defendants, making no dispute about the wheat, insisted that the plaintiffs should take the whole 345 quarters of rye, and refused to deliver any unless they would accept all. The plaintiffs thereupon, after making a formal demand of 300 quarters of rye and 50 of wheat, abandoned the contract, and sued for the amount of the bill of exchange which they had paid. Evidence was offered (and rejected) to show that it was contrary to the custom of merchants to require a buyer to receive so large an excess as was offered to the plaintiffs, under the expression "more or less." The plaintiffs had a verdict, and the Court refused to disturb it, Lord Tenterden, C. J., and Littledale, J., both thinking that the excess was too great to be covered by the words "more or less;" Parke and Patteson, JJ., expressing a doubt on that point, but holding, that the expressions being obscure, the burthen of proof lay on the vendors, who were seeking to enforce the contract, and that they had failed to show clearly what was the meaning of the parties.

*Cross v. Eglin.*

In *Cockerell v. Aucompte*,<sup>2</sup> the Court refused to give

*Cockerell v. Aucompte.*

<sup>1</sup> 2 B. & Ad. 106.

<sup>2</sup> 2 C. B., N. S. 440; 28 L. J., C. P. 194.



consideration to an objection against paying for 127 tons of coal, on a contract to deliver 100 tons "more or less;" but the coals had been supplied, and there was no offer to return them.

*Bourne v. Seymour.*

*Bourne v. Seymour*,<sup>1</sup> was a contract for the sale of "about" 500 tons of nitrate of soda, but the terms of the written contract made out by the brokers were so obscure, that the case is of no value as a precedent. Cresswell, J., said that he did not think the parties understood the contract, "nor do I."<sup>2</sup>

*Moore v. Campbell.*

In *Moore v. Campbell*,<sup>3</sup> the sale was of 50 tons of hemp, and the vendor offered the buyer two delivery orders from a warehouse for "about" 30 tons, and "about" 20 tons respectively, which the buyer declined, unless the vendor would guaranty that the whole quantity amounted to 50 tons. The vendor refused, and on the trial offered evidence that it was the usage of trade in Liverpool, where the contract was made, to insert the word "about" in delivery orders of goods warehoused. *Held*, that if this evidence had been offered in reference to the purchase of fifty tons of goods contracted to be sold and delivered simply, the evidence would be inadmissible; but if the contract be to sell and deliver *goods in a warehouse*, and there is a known usage of the place that warehousemen will not accept delivery orders in any other form, by reason of objecting to make themselves responsible for any particular quantity, the delivery warrants made in that form would, if tendered, be a sufficient compliance with the vendor's duty under the contract.

Where vendor is to send goods, delivery to common carrier suffices.

Where the vendor is bound to send the goods to the purchaser, the rule is well established, as shown *ante*, p. 180, that delivery to a common carrier, *a fortiori*, to one specially designated by the purchaser, is a delivery to the purchaser himself; the carrier being, in contemplation of law in such cases, the bailee of the person to whom, not *by* whom, the

<sup>1</sup> 16 C. B. 337; 24 L. J., C. P. 202.

<sup>2</sup> 24 L. J., C. P. 207.

<sup>3</sup> 10 Ex. 323; 23 L. J., Ex. 310.

goods are sent ; the latter when employing the carrier being regarded as the agent of the former for that purpose.<sup>1</sup>

If, however, the vendor should sell goods, undertaking to make the delivery himself at a distant place, thus assuming the risks of the carriage, the carrier is the vendor's agent.<sup>2</sup> Where goods are ordered from a distant place, the vendor's duty to deliver them in merchantable condition is complied with if the goods are in proper condition when delivered to the carrier, provided the injury received during the transit does not exceed that which must necessarily result from the transit.

Vendor may contract to deliver at a distant place, and then carrier is his agent.

But he is not responsible for necessary deterioration occasioned by the transit.

Where hoop-iron was sold in Staffordshire, deliverable in Liverpool in the winter, the vendor was held to have made a good delivery, although the iron was rusted and unmerchantable when delivered in Liverpool, on proof that this deterioration was the necessary result of the transit, and that the iron was bright and in good order when it left Staffordshire.<sup>3</sup>

But the vendor is bound, when delivering to a carrier, to take the usual precautions for ensuring the safe delivery to the buyer. In *Clarke v. Hutchins*,<sup>4</sup> the vendor, in delivering goods to a trading vessel, neglected to apprise the carrier that the value of the goods exceeded 5*l.*, although the carriers had published, and it was notorious in the place of shipment, that they would not be answerable for any package above that amount unless entered and paid for as such. The package was lost, and on the vendor's action for goods sold and delivered, it was held by the King's Bench, Lord Ellenborough giving the decision, that the vendor had not made a delivery of the goods ; not having "put them in

Vendor bound to take the usual precautions to ensure safe delivery by carrier.

*Clarke v. Hutchins*.

<sup>1</sup> *Dawes v. Peck*, 8 T. R. 330 ; *Waite v. Baker*, 2 Ex. 1 ; *Fragano v. Long*, 4 B. & C. 219 ; *Dunlop v. Lambert*, 6 Cl. & Fin. 600 ; *Johnson v. Dodgson*, 2 M. & W. 653 ; *Norman v. Phillips*, 4 M. & W. 277 ; *Meredith v. Meigh*, 2 E. & B. 364, and 22 L. J., Q. B. 401 ; *Cusack v. Robinson*, 1 B. & S. 299, and 30 L. J., Q. B. 261 ; *Hart v. Bush*, E. B. & E. 494, and 27

L. J., Q. B. 271 ; *Smith v. Hudson*, 34 L. J., Q. B. 145.

<sup>2</sup> *Dunlop v. Lambert*, 6 Cl. & F. 600.

<sup>3</sup> *Bull v. Robison*, 10 Ex. 342 ; 24 L. J., Ex. 165.

<sup>4</sup> 14 East, 475. See, also, *Buckman v. Levi*, 3 Camp. 414 ; *Cothay v. Tute*, 3 Camp. 129.

such a course of conveyance as that, in case of a loss, the defendant might have his indemnity against the carriers."

Vendor bound to give an opportunity to inspect the goods.

In offering delivery the vendor is bound to give the buyer an opportunity of examining the goods, so that the latter may satisfy himself whether they are in accordance with the contract. Thus in *Isherwood v. Whitmore*,<sup>1</sup> the defendants having received notice that the goods were at a certain wharf ready for delivery on payment of the price, went there, but on application to inspect the goods, were shown two closed casks said to contain them. The persons in charge refused to allow the casks to be opened. Held, that the plaintiff had not made a valid offer of delivery.

Symbolical delivery.

There may be a symbolical delivery of goods, divesting the vendor's possession and lien. Lord Ellenborough said, in *Chaplin v. Rogers*,<sup>2</sup> that "where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery, but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by the delivery of other *indicia* of property." And there was a like *dictum* by Lord Kenyon in *Ellis v. Hunt*.<sup>3</sup> On this principle the delivery of the grand bill of sale of a vessel at sea has always been held to be a delivery of the vessel.<sup>4</sup>

Indicia of property.

So the endorsement and transfer to the buyer of bills of lading, dock and wharf warrants, delivery orders, and other like instruments, which among merchants are known as representing the goods, would form a good delivery in *performance of the contract*, so as to defeat any action by the buyer against the vendor for non-delivery of the goods, according to the principles settled in *Salter v. Woollams*<sup>5</sup> and *Wood v. Manley*;<sup>6</sup> but the effect of transferring such documents of title upon the rights of the unpaid vendor is discussed hereafter in the chapters on Lien and Stoppage

<sup>1</sup> 11 M. & W. 347; and *per Parke, B.*, in *Startup v. McDonald*, 6 M. & G. 593.

<sup>2</sup> 1 East, 192.

<sup>3</sup> 3 T. R. 464.

<sup>4</sup> *Atkinson v. Maling*, 2 T. R. 462.

<sup>5</sup> 2 M. & G. 650.

<sup>6</sup> 11 Ad. & E. 34.

*in Transitu.* The transfer of such documents would of course not be a sufficient delivery by the vendor, if the goods represented by the documents were subject to liens or charges in favour of the bailees.

In a case in the State of Vermont,<sup>1</sup> where wool lying in bulk on the vendor's premises was sold, payable on delivery by weight, the vendor was not allowed, in the absence of an express agreement, to recover the cost of labour, &c., in putting the wool into sacks furnished by the purchaser, the wool not having been weighed till after being put into the sacks.

Vendor not entitled to costs of labour in putting goods sold by weight and lying in bulk, into packages furnished by buyer.

<sup>1</sup> *Cole v. Kew*, 20 Vermont Rep. 21.

# PART III.

## BUYER'S DUTIES.

### CHAPTER I.

#### ACCEPTANCE.

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Buyer must fetch goods bought .	518	delivery . . . . .	520
Liable in damages for unreason- able delay . . . . .	519	Mere receipt is not acceptance .	520
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Buyer must  
fetch goods  
bought.

THE vendor having done or tendered all that his contract requires, it becomes the buyer's duty to comply in his turn with the obligations assumed. In the absence of express stipulations imposing other conditions, the buyer's duties are performed when he ACCEPTS, and PAYS the price.

AS to ACCEPTANCE, little need be said. When the vendor has tendered delivery, if there be no stipulated place, and no special agreement that the vendor is to send the goods, the buyer must fetch them; for it is settled law that the vendor need not aver nor prove in an action against the buyer anything more than his readiness and willingness to deliver on payment of the price.<sup>1</sup>

<sup>1</sup> Jackson v. Allaway, 6 M. & G. 804; Cort v. Ambergate Railway Company, 17 Q. B. 127; 20 L. J., Q. B. 460; Baker v. Firminger, 28 L. J., Ex. 130; Cutter v. Powell, 2 Sm. L. C. 1, and notes.

And if the vendee make default in fetching away the goods within a *reasonable time* after the sale, upon request made by the vendor, the vendee will be liable for warehouse rent and other expenses growing out of the custody of the goods, or in an action for damages if the vendor be prejudiced by the delay.<sup>1</sup>

And is liable for default in fetching goods in reasonable time.

The question of what is a reasonable time is one of fact for a jury under all the circumstances of the case.<sup>2</sup>

Reasonable time to be determined by jury.

In *Jones v. Gibbons*<sup>3</sup> it was held no defence to an action by the buyer for non-delivery "as required" that he had not requested delivery within a reasonable time. If the vendor wanted to get rid of his obligation because of unreasonable delay in taking the goods, or in requiring delivery, it was for him to offer delivery, or to inquire of the buyer whether he would take the goods, and he had no right to treat the contract as rescinded by mere delay.

Contract to deliver "as required."

*Jones v. Gibbons.*

It has already been seen, in the chapter on Delivery, that the buyer is entitled before acceptance to a fair opportunity of inspecting the goods, so as to see if they correspond with the contract. He is not bound to accept goods in a closed cask which the vendor refuses to open;<sup>4</sup> nor to comply with the contract at all, but may rescind it, if the seller refuse to let him compare the bulk with the sample by which it was sold, when the demand is made at a proper and convenient time;<sup>5</sup> nor to remain at his place of business after sunset on the day fixed for delivery, nor even, if he happens to be there after sunset, to accept unless there be time before midnight for inspecting and receiving the goods;<sup>6</sup> nor to select the goods bought out of a larger quantity, or a mixed lot that the vendor has sent him.<sup>7</sup> In a word, as delivery

Buyer has right to inspect before acceptance.

<sup>1</sup> *Per* Lord Ellenborough, in *Greaves v. Ashlin*, 3 Camp. 426; also *per* Bayley, J., in *Bloxam v. Sanders*, *ante*, p. 502.

<sup>2</sup> *Buddle v. Green*, 3 H. & N. 996; 27 L. J., Ex. 33.

<sup>3</sup> 8 Ex. 920.

<sup>4</sup> *Isherwood v. Whitmore*, 10 M. & W. 757; 11 M. & W. 347.

<sup>5</sup> *Lorymer v. Smith*, 1 B. & C. 1;

*Toulmin v. Headley*, 2 C. & K. 157.

<sup>6</sup> *Startup v. McDonald*, 6 M. & G. 598.

<sup>7</sup> *Dixon v. Fletcher*, 3 M. & W. 146; *Hart v. Mills*, 15 M. & W. 85; *Nicholson v. Bradfield Union*, L. R. 1, Q. B. 620; 35 L. J. Q. B. 176; *Levy v. Green*, 8 E. & B. 575; 1 E. & E. 969; 27 L. J., Q. B. 111; 28 L. J., Q. B. 319.

and acceptance are concurrent conditions, it is enough to say that the vendee's duty of acceptance depends altogether upon the sufficiency or insufficiency of the delivery offered by the vendor.

Right to measure goods sold by the yard.  
Pettitt v. Mitchell.

But in *Pettitt v. Mitchell*,<sup>1</sup> it was held that the buyer had not the right to *measure* goods sold *by the yard* under the special circumstances of the case. The sale was at auction, and the conditions were that the purchasers were to pay an immediate deposit of 5s. in the pound in part payment; that the lots must be taken away with all "faults, imperfections, or errors of description," by the following Saturday; that the remainder of the purchase-money was to be paid *before delivery*: and the catalogue also announced that "the stock comprised in this catalogue has been measured to the yard's end, and will be delivered with all faults and errors of description. All the small remnants must be cleared at the measure stated in the catalogue." The goods remained open for public inspection two days *before* the sale. The defendant bought several lots, and went on the proper day to take the goods, but claimed a right to inspect and measure them *before paying*, which was refused. The action was for damages in special assumpsit, and the defendant pleaded a breach by plaintiff of conditions precedent, to wit, that the purchaser should be entitled "to *inspect and examine* the lot purchased by him, for the purpose of ascertaining whether the same was of the proper *quantity, quality, and description*, &c., &c.; and in another plea, breach of a condition, that the purchaser "should be entitled to *measure* the lot."

Held, that the law did not imply the conditions stated in the pleas; and that under the contract as made, the buyer was bound to pay before delivery, but that he had the right *after delivery, and before taking away the goods*, to measure them and claim an allowance for deficient measure, if any.

Mere receipt is not acceptance.

When goods are sent to a buyer in performance of the vendor's contract, the buyer is not precluded from objecting

<sup>1</sup> 4 M. & G. 819.

to them by merely *receiving* them, for receipt is one thing and acceptance another. But receipt will become acceptance if the right of rejection is not exercised within a reasonable time,<sup>1</sup> or if any act be done by the buyer which he would have no right to do unless he were owner of the goods. The following cases illustrate these rules, in addition to the authorities reviewed, *ante*, pp. 106, *et seq.*

But becomes so by delay in rejecting, or by act of ownership.

In *Parker v. Palmer*,<sup>2</sup> the purchaser, after seeing fresh samples drawn from the bulk of rice purchased by him, which were inferior in quality to the original sample by which he bought it, offered the rice for sale at a limited price at auction, but the limit was not reached, and the rice not sold. He then rejected it, as inferior to sample; but *held*, that by dealing with the rice as owner, after seeing that it did not correspond with the sample, he had waived any objection on that score.

*Parker v. Palmer.*

In *Sanders v. Jameson*,<sup>3</sup> it was proven that by the custom of the Liverpool corn-market, the buyer was only allowed one day for objecting that corn sold was not equal to sample, after which delay the right of rejection was lost. Rolfe, B., held that this was a reasonable usage, binding on the purchaser.

*Sanders v. Jameson.*

In *Chapman v. Morton*,<sup>4</sup> a cargo of oil-cake was shipped by the plaintiffs, from Dieppe to the defendant, a merchant, at Wisbech, in Cambridgeshire. On its arrival, in December, 1841, the defendant made complaint that it did not correspond with the sample. He, however, landed a part for the purpose of examination, and considering it not equal to sample, landed the whole, lodged it in the public granary, and on the 24th January, 1842, wrote to the plaintiffs that it lay there at their risk, and required them to take it back, which they refused to do. Some intervening negotiations took place, without result, and in May, 1842, the defendant wrote to the plaintiffs that the oil cake was lying in the granary at their disposal, and that if no directions were

*Chapman v. Morton.*

<sup>1</sup> *Bianchi v. Nash*, 1 M. & W. 545 ;  
*Beverley v. Lincoln Gas Light Com-*  
*pany*, 6 Ad. & E. 829.

<sup>2</sup> 4 B. & A. 387.

<sup>3</sup> 2 C. & K. 557.

<sup>4</sup> 11 M. & W. 534.



given by them, he would sell it for the best price he could get, and apply the proceeds in part satisfaction of his damage. The defendant had paid for the cargo, by acceptances, before its arrival, and had taken up these acceptances, which were held by third parties. The plaintiffs replied that they considered the transaction closed. In July following, the defendant advertised the cargo for sale in *his own name*, and sold it in *his own name*, to a third person. On these facts it was held, that the defendant had accepted the cargo. Lord Abinger said: "We must judge of men's intentions by their acts, and not by expressions in letters, which are contrary to their acts. If the defendant intended to repudiate the contract, he ought to have given the plaintiffs distinct notice at once that he repudiated the goods, and that on such a day he should sell them by such a person, for the benefit of the plaintiffs. The plaintiffs could then have called on the auctioneer for the proceeds of the sale. Instead of taking this course, the defendant has exposed himself to the imputation of playing fast and loose, declaring in his letters that he will not accept the goods, but at the same time preventing the plaintiffs from dealing with them as theirs." Parke, B., thought that there was no acceptance by the defendant down to the month of May, "but the subsequent circumstances of his offering to sell, and selling the cargo in his own name, are very strong evidence of his taking to the goods, which will not deprive him of his cross-remedy for a breach of warranty, but whereby the property in the goods passed to him, which may be considered as having been again offered to him by the plaintiff's letter in the month of May." Alderson and Rolfe, BB., concurred.

Refusal to accept where goods do not agree with sample.

The question whether on the sale of specific goods the purchaser may refuse acceptance because they do not correspond with sample, is discussed, *post*, Book V., Part II., Ch. 1.

## CHAPTER II.

### PAYMENT AND TENDER.

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Payment  
absolute or  
conditional.

THE chief duty of the buyer in a contract of sale is to pay the price in the manner agreed on. The terms of the sale may require, 1st, an *absolute* payment in cash, and this is always implied when nothing is said; or 2ndly, a *conditional* payment in promissory notes or acceptances; or 3rdly, it may be agreed that credit is given for a stipulated time, without payment, either absolute or conditional. In the first two cases, the buyer is bound to pay, if the vendor is ready to deliver the goods, as soon as the contract is made; but in the last case he has a right to demand possession of the goods without payment.

At common  
law, a man  
bound to pay is  
not entitled to  
wait for de-  
mand.

The rule of the common law is that a man bound to pay has no right to delay till demand made, but must pay as soon as the money is due, under peril of being sued; and it has already been stated<sup>1</sup> that the vendor, in the absence of a stipulation to the contrary, is not bound to send or carry the goods, nor to allege or prove in an action against the buyer any thing more than a readiness and willingness to deliver. It therefore follows that as soon as a sale is completed by mutual assent, and no time given, the buyer ought at once to make payment, if the goods are ready for delivery, without waiting for a demand, and that an action is maintainable against him for the price if he fail to do so.<sup>2</sup>

<sup>1</sup> *Ante*, p. 502.

<sup>2</sup> 1 Wms. Saunders, 33 b. n. 2.

In *Briggs v. Calverley*,<sup>1</sup> the vendor attempted to go one step further, and to reject a tender of the price because not made till after he had instructed his attorney to sue out a *latitat* against the buyer, and after the attorney had applied for the writ, but before the writ was actually issued. Lord Kenyon, C. J., said it was impossible to contend that the tender came too late, "having been made before the commencement of the suit."

Tender valid before writ issued.

But the contract sometimes provides that the payment is only to be made after demand or notice, and when this is the case, a reasonable time must be allowed for the buyer to fetch the money. In *Brighty v. Norton*,<sup>2</sup> where a bill of sale provided that payment should be made in ten years, or "at such earlier day or time as the defendant should appoint by notice in writing sent by post, or delivered to the plaintiff or left at his house or last place of abode," it was held that a notice served at noon to make payment in half an hour was not a reasonable notice, the judges concurring in this, though agreeing that it was difficult to say in general what would be a reasonable time.

Where price is payable only after demand, reasonable time allowed to fetch the money.  
*Brighty v. Norton.*

And in *Toms v. Wilson*,<sup>3</sup> it was held by the Queen's Bench, and in error by the Exchequer Chamber, that a promise to pay "immediately on demand" could not be construed so as to deprive the debtor of an opportunity to get the money which he may have in Bank or near at hand; and Blackburn, J., said that "if a condition is to be performed immediately, or on demand, that means that a reasonable time must be given, according to the nature of the thing to be done."<sup>4</sup>

*Toms v. Wilson.*

As to the mode of payment, the buyer will be discharged if he make payment in accordance with the vendor's request, even if the money never reach the vendor's hands; as if it be transmitted by post in compliance with the vendor's directions and be lost or stolen.<sup>5</sup> But Lord Kenyon held that a

Payment good if made in mode requested by vendor.

<sup>1</sup> 8 T. R. 629.

<sup>4</sup> Com. Dig. tit. Conditions, G. 5.

<sup>2</sup> 32 L. J., Q. B. 38; 3 B. & S. 305.

<sup>5</sup> *Warwick v. Noakes*, Peake, 68,

<sup>3</sup> 4 B. & S. 442, 455; 32 L. J., Q. 98.

B. 33, 382.

Money sent by  
post.

direction to send by post was not complied with by the delivery of a letter, with the remittances enclosed, to the bellman or postman in the street, but should have been put into the general post-office or a receiving office authorised to receive letters with money.<sup>1</sup>

Caine v. Coul-  
son.

In *Caine v. Coulson*,<sup>2</sup> the plaintiff's attorney wrote to the defendant to *remit* the balance of the account due to the plaintiff, with 13s. 4d. costs. The defendant remitted by post a banker's bill payable at sight for the amount of the account without the costs. The next day the attorney wrote refusing to accept the bill unless the 13s. 4d. were also remitted. The defendant refused, and action was brought; but the attorney kept the banker's bill, although he did not cash it. The jury found that the attorney had waived any objection to the remittance not having been made in cash, and only objected because the costs were not paid. Held, that the payment was good, on the ground that it was the attorney's duty to return the banker's bill if he did not choose to receive it in payment. Martin, B., said of the attorney's conduct, "he says one thing, but he does another; he kept the banker's draft. It seems to me to be common sense to look at what is done, and not to what is said." This case was distinguished by Pollock, C. B., in giving his decision, from *Gordon v. Strange*,<sup>3</sup> and *Hough v. May*,<sup>4</sup> which will presently be noticed, on the ground that in this case the creditor ordered the money *remitted*, which the learned Chief Baron said was of the very essence of the question.

Eyles v. Ellis.

In *Eyles v. Ellis*,<sup>5</sup> both parties kept an account at the same banker's, and the plaintiff directed the amount to be paid there. The defendant ordered the banker to put the amount to the plaintiff's credit on Thursday, which was done, and the defendant so wrote to the plaintiff on Friday, but the plaintiff did not get the letter till Sunday. On Saturday the banker failed. Held, a good payment, although

<sup>1</sup> *Hawkins v. Rutt, Peake*, 186, & W. 596.  
248.

<sup>2</sup> 1 Ex. 477.

<sup>3</sup> 1 H. & C. 764; 32 L. J., Ex. 97.

<sup>4</sup> 4 Ad. & E. 954.

And see *Hardman v. Bellhouse*, 9 M.

<sup>5</sup> 4 Bing. 112.

the defendant, when the money was transferred on the banker's books, had already overdrawn his account.

In *Gordon v. Strange*,<sup>1</sup> the defendant sent a post-office order in payment of a debt due to the plaintiff, *without any direction* from the plaintiff. The order, by mistake, was made payable to Frederick Gordon instead of Francis Gordon. The plaintiff did not get it cashed, although he was told by the person who kept the post-office that the money would be paid to him if he would sign the name of the payee, as there was no one of the same name in the neighbourhood. The plaintiff brought action, without returning the post-office order. The sheriff told the jury that the plaintiff having kept the order, with a knowledge that he might get the money for it at any time, was evidence of payment, although he was not bound, when he first received it, to put any name on it but his own. Held, a wrong direction; "the defendant had no right to give the plaintiff the trouble of sending back a piece of paper which he had no right to send him."

*Gordon v.  
Strange.*

If the buyer has stated an account with the vendor, in which the vendor has, by mutual agreement, received credit for the amount of the goods sold, as a set-off against items admitted to be due by the vendor to the buyer, this is equivalent to an actual cash payment by the buyer of the price of the goods. The principle was thus explained by Lord Campbell, in a case which involved the necessity of a stamp to a written agreement, offered in proof of a plea of payment.<sup>2</sup> "The way in which an agreement, to set one debt against another of equal amount, and discharge both, proves a plea of payment is this: if the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the cross debt, both would be paid. When the parties agree to consider both debts discharged without actual payment, it has the same effect, because, in contemplation of law, a pecuniary transaction is supposed to have taken place by

*Set-off in account stated, same as payment.*

<sup>1</sup> 1 Ex. 477.

<sup>2</sup> *Livingstone v. Whiting*, 15 Q. B. 722; 19 L. J., Q. B. 528.

Rule not applicable to ordinary accounts current.

Tender is equivalent to payment.

Requisites of valid tender.

Dickinson v. Shee.

Waiver of production of the money.

Leatherdale v. Sweepstone.

Thomas v. Evans.

which each debt was then paid." A written memorandum of such a transaction was therefore held to be a receipt requiring a stamp. The cases establishing the above principle as to accounts stated, are quite numerous;<sup>1</sup> but the rule is not applicable to ordinary accounts current, with no agreement to set off the items.<sup>2</sup>

In the absence of any of these special modes of payment, it is the buyer's duty, under the contract, to make actual payment in cash, or a tender of payment which is as much a performance and discharge of his duty as an actual payment.

A tender is only validly made when the buyer produces and offers to the vendor an amount of *money equal* to the price of the goods. But the actual production of the money may be dispensed with by the vendor. The Courts, however, have been rigorous in requiring proof of a dispensation with the production of the money.

In *Dickinson v. Shee*,<sup>3</sup> the debtor went to the attorney of the creditor, saying he was ready to pay the balance of the account, 5*l.* 5*s.*, and the attorney said he could not take that sum, the claim being above 8*l.* *Held*, not a good tender because the money was not produced, and the defendant had not dispensed with the production; "if he saw it produced, he might be induced to accept of it."

In *Leatherdale v. Sweepstone*,<sup>4</sup> the defendant offered to pay the plaintiff, and put his hand into his pocket, but before the money could be produced the plaintiff left the room. *Held*, by Lord Tenterden, to be no tender.

In *Thomas v. Evans*,<sup>5</sup> the plaintiff called at his attorney's office to receive money, and was told by the clerk that he had 10*l.* for him, which had been left by the attorney to be paid to him. The plaintiff, who wrongly supposed that a

<sup>1</sup> *Owens v. Denton*, 1 Cr. M. & R. 711; *Callendar v. Howard*, 10 C. B. 290; *Ashby v. James*, 11 M. & W. 542; *McKellar v. Wallace*, 8 Moore, P. C. 378; *Smith v. Page*, 15 M. & W. 683; *Sutton v. Page*, 3 C. B. 204; *Clark v. Alexander*, 8 Scott, N. R. 147; *Scholey v. Walton*, 12 M. &

W. 510; *Worthington v. Grimaditch*, 7 Q. B. 479; *Sturdy v. Arnaud*, 3 T. R. 599.

<sup>2</sup> *Cottam v. Partridge*, 4 M. & G. 271.

<sup>3</sup> 4 Esp. 68.

<sup>4</sup> 3 C & P. 342.

<sup>5</sup> 10 East, 101.

larger sum had been collected for him, said he would not receive the 10*l*. The clerk did not produce the money. Held, no tender.

In the latest case, *Finch v. Brook*,<sup>1</sup> in the Common Pleas, *Finch v. Brook*. in 1834, the defendant's attorney called on the plaintiff and said: "I have come to pay you 1*l*. 12*s*. 5*d*., which the defendant owes you," and put his hand in his pocket; whereupon the plaintiff said: "I can't take it; the matter is now in the hands of my attorney." The money was not produced. Held, no tender. The facts were found on a special verdict, and the judges said that the jury, on the facts, would have been justified in finding a dispensation, and the Court would not have interfered. Vaughan, J., said that Sir James Mansfield, who had held, in *Lockyer v. Jones*,<sup>2</sup> that the creditor could not object to the non-production of the money if at the time of the tender he had refused to receive it on the ground that he claimed a larger amount, had in a subsequent case said, "that great importance was attached to the production of the money, as the sight of it might tempt the creditor to yield."

The following are cases in which the Courts have held the acts or sayings of the creditor sufficient to dispense with the production of the money:—*Douglas v. Patrick*,<sup>3</sup> where the debtor said he had eight guineas and a half in his pocket which he had brought for the purpose of satisfying the demand, and the creditor said "he need not give himself the trouble of offering it, for he would not take it, as the matter was in the hands of his attorney;" *Read v. Goldring*,<sup>4</sup> where the debtor pulled out his pocket-book and told the creditor, whom he met in the street, that if he would go into a neighbouring public-house with him, he would pay him 4*l*. 10*s*., and the creditor said "he would not take it;" *Alexander v. Brown*,<sup>5</sup> where the person who made a tender of 29*l*. 19*s*. 8*d*. had in his hand two bank notes twisted up and enclosing four sovereigns and 19*s*. 8*d*. in

Examples of  
sufficient  
waivers.

*Douglas v.*  
*Patrick.*

*Read v. Gold-*  
*ring.*

*Alexander v.*  
*Brown.*

<sup>1</sup> 1 Bing. N. C. 253.

<sup>4</sup> 2 M. & S. 86.

<sup>2</sup> Peake, 239, n.

<sup>5</sup> 1 C. & P. 288.

<sup>3</sup> 3 T. R. 683.



change, making the precise sum, and told the plaintiff what it was, but did not open it before him, and it was objected that he ought to have *shown* him the money; Best, C. J., saying in this last case, that if the debtor had not mentioned the amount to the creditor, the tender would not have been sufficient.

Harding v.  
Davis.

In *Harding v. Davis*,<sup>1</sup> the proof was that the defendant, at her own house, offered to pay the plaintiff 10*l.*, saying that she would go up stairs and fetch it, and the plaintiff said "she need not trouble herself for he could not take it." Held, by Best, C. J., to be a good tender, the learned Chief Justice adding, however, "I agree that it would not do if a man said, I have got the money, but must go a mile to fetch it."

Tender must be  
so made that  
creditor can ex-  
amine and  
count the  
money.

The tender must of course be made in such manner as will enable the creditor to examine and count the money, but it may be produced in a purse or bag ready to be counted by the creditor if he choose, provided the sum be the correct amount.<sup>2</sup>

In what coin  
tender must  
be made.

The tender must, at common law, be made in the current coin of the realm,<sup>3</sup> or foreign money legally made current by proclamation.<sup>4</sup> And by "The Colonial Branch Mint Act, 1866," 29 & 30 Vict. c. 65, Her Majesty is empowered by proclamation to declare that gold coins made at Colonial Branch Mints shall be a legal tender within any part of Her Majesty's dominions specified in such proclamation. Tenders for all sums exceeding 40*s.* must be made in gold,<sup>5</sup> or (if in excess of 5*l.*) may be made in notes of the Bank of England, payable to bearer so long as the Bank of England shall continue to pay on demand its notes in legal coin; but the notes thus made a legal tender are only such as are payable to bearer on demand.<sup>6</sup> Silver coin is a good legal tender for the amount of 40*s.* or less.<sup>7</sup> There is no statute

<sup>1</sup> 2 C. & P. 77. And see *Jones v. Cliff*, 1 C. & M. 540.

<sup>2</sup> *Isherwood v. Whitmore*, 11 M. & W. 347.

<sup>3</sup> *Wade's case*, 5 Rep. 114 a.

<sup>4</sup> *Bac. Abr. Tender* (B. 2); *Wade's*

*case*, 5 Rep. 114; *Case of Mixed Monies*, *Davy's*, 18.

<sup>5</sup> 56 Geo. III. c. 68, s. 11, 12.

<sup>6</sup> 3 & 4 Will. IV. c. 98, s. 6.

<sup>7</sup> 56 Geo. III. c. 68, s. 12.

making copper money a legal tender, and it is therefore inferred that a tender in copper money, unless for a fraction smaller than the smallest silver coin, would not be good. Lord Coke says that the money of England must be either of gold or of silver.<sup>1</sup>

When the tender is made in a currency different from that required by the law, the Courts are much less rigorous in inferring a dispensation than in cases where no money is produced. If the buyer should offer his vendor a country bank note, or a cheque, or silver coin for a debt exceeding 40s., and the vendor should refuse to receive payment, alleging any other reason than the *quality* of the tender; as if he should say that more was due him, and he would not accept the *amount* tendered, the inference would be readily admitted that he dispensed the buyer from offering the coin or Bank of England notes strictly requisite to make the tender valid.

Waiver of objection to the kind of money offered easily inferred.

In *Polyglass v. Oliver*<sup>2</sup> all the earlier cases were reviewed, and it was held that a tender in country bank notes where the plaintiff made no objection on that account, but said "I will not take it, I claim for the last cargo of soap," was a valid tender. Bayley, B., gave as a reason, that "if you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money, and making a good and valid tender." But by not doing so, and claiming a larger sum, you delude him."

*Polyglass v. Oliver.*

A tender of more than is due is a good tender, for *omne majus continet in se minus*, and the creditor ought to take out of the sum tendered him as much as is due to him.<sup>3</sup> A tender, therefore of 20*l.* 9*s.* 6*d.* in bank-notes and silver, proves a plea of tender of 20*l.*<sup>4</sup> So, where the debtor put down 150 sovereigns on the attorney's desk, and told him to

Tender of more than is due.

<sup>1</sup> 2 Inst. 577.

Ex. 97.

<sup>2</sup> 2 Cro. & J. 65. See, also, Jones v. Arthur, 8 Dowl. P. C. 442; Caine v. Coulson, 1 H. & C. 764; 32 L. J.,

<sup>3</sup> Wade's case, 3rd resolution, 5 Rep. 115.

<sup>4</sup> Dean v. James, 4 B. & Ad. 546.

take out of it what was due to him, *held*, a good tender for 108*l*.<sup>1</sup>

Tender with  
demand for  
change.

But a tender of a larger sum than is due, with a demand for change is not a good tender, if the creditor objects to giving change.

Watkins v.  
Robb.

In *Watkins v. Robb*,<sup>2</sup> the proof in support of a plea of tender of 4*l*. 19*s*. 6*d*. was that the debtor tendered a five-pound note, and demanded sixpence change, but Buller, J., was of opinion that the creditor was not bound to give change, and held the tender bad.

Betterbee v.  
Davis.

So, a tender of a five-pound note in payment of 3*l*. 10*s*., with a demand for the change, was held no tender by Le Blanc, J., in *Betterbee v. Davis*,<sup>3</sup> the learned judge saying that if that was good, a tender of a 50,000*l*. note, with demand for change, would be equally good.

Tadman v.  
Lubbock.

But in *Tadman v. Lubbock*, decided in M. Term, 1824 (and reported in the note to *Blow v. Russell*),<sup>4</sup> where a tender of 1*l*. 18*s*. was pleaded, the proof was that the party offered two sovereigns and asked for change, and that the other refused the tender, *on the ground* that more than 1*l*. 18*s*. was due. The Court of King's Bench held this a good tender.

No valid tender  
of part of entire  
debt.

It is now settled that there can be no valid tender of part of an *entire* debt, though a debtor may make a valid tender of one of several distinct debts if he specify the debt on account of which he makes the tender; and if he makes a tender without specifying which of several debts is the subject of the tender, and the amount tendered be insufficient to cover all, it will not be good for *any*.

Dixon v.  
Clarke.

In *Dixon v. Clarke*<sup>5</sup> the authorities were all reviewed, and Wilde, C. J., gave a very lucid exposition of the whole subject of tender, from which the following passages are extracted: "The argument further involved the general question, whether a tender of part of an entire debt is good. \* \*

<sup>1</sup> *Bevans v. Rees*, 5 M. & W. 306; and see *Douglas v. Patrick*, 3 T. R. 683; *Black v. Smith, Peake*, 88.

<sup>2</sup> 2 Esp. 711.

<sup>3</sup> 3 Camp. 70. See *Robinson v. Cook*, 6 Taunt. 336.

<sup>4</sup> 1 C. & P. 366.

<sup>5</sup> 5 C. B. 365.

On consideration, we are of opinion, upon principle, that such a tender is bad.

“In actions of debt and assumpsit the principle of the plea of tender in our apprehension is that the defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded, and that he did perform it as far as he was able by tendering the requisite money; the plaintiff himself precluding a complete performance by refusing to receive it. And as in ordinary cases the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain his plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prist* and *profert in curiam*), yet he will answer the action in the sense that he will recover judgment for his cost of defence against the plaintiff, in which respect the plea of tender is essentially different from that of payment of money into court. And as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar.

“With respect to the averment of *toujours prist*, if the plaintiff can falsify it, he avoids the plea altogether. Therefore, if he can show that an *entire* performance of the contract was demanded, and refused *at any time*, when by the terms of it he had a right to make such a demand, he will avoid the plea. Hence, if a demand of the whole sum originally due is made, and refused, a subsequent tender of part of it is bad, *notwithstanding that by part payment or other means the debt may have been reduced in the interim to the sum tendered*. And this is the principle of the decision in *Cotton v. Godwin*.<sup>1</sup> If, however, the demand was of a larger sum than that originally due under the contract, a refusal to pay it would *not* falsify the *toujours prist*, even though the amount demanded were made up of the

<sup>1</sup> 7 M. & W. 147.

sum due under the contract and some other debt due from the defendant to the plaintiff. And this is the principle of the decisions of *Brandon v. Newington*<sup>1</sup> and *Hesketh v. Fawcett*,<sup>2</sup> which appear to overrule *Tyler v. Bland*.<sup>3</sup>

"This principle, however, we think is only applicable where the larger sum is demanded *generally*, and can hardly be enforced where it is explained to the defendant at the time how the amount demanded is made up; for in such case the transaction appears to be nothing less than a simultaneous demand of the several debts, so as to falsify the averment of *toujours prist* as to *each*.

"But besides the averment of *readiness* to perform, the plea must aver an *actual performance* of the entire contract on the part of the defendant so far as the plaintiff would allow. And it is plain that where by the terms of it the money is to be paid on a *future day certain*, this branch of the plea can only be satisfied by *alleging a tender on the very day*. And this is the principle of the decisions of *Hume v. Peploe*<sup>4</sup> and *Poole v. Tunbridge*.<sup>5</sup> It is also obvious that the defect in the plea in this respect cannot be remedied by resorting to the previous averment of *toujours prist*. Consequently, a plea by the acceptor of a bill or the maker of a note, of a performance *post diem*, is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always *ready* to pay, not only from the time of the tender (as the plea was in *Hume v. Peploe*), but also from the time when the bill or note became payable. On the same reasoning it appears to us that this branch of the plea can only be satisfied by *alleging a tender of the whole sum* due under the contract, for that a tender of part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow."

This thorough exposition of the subject was followed by

<sup>1</sup> 3 Q. B. 915.

<sup>2</sup> 11 M. & W. 356.

<sup>3</sup> 9 M. & W. 338.

<sup>4</sup> 8 East, 168.

<sup>5</sup> 2 M. & W. 223.

the further decision in *Hardingham v. Allen*,<sup>1</sup> by the same Court, in the same year, deciding that where a demand was made of 1*l.* 7*s.* for several matters, including 10*s.* for a particular contract, a tender of 19*s.* 6*d.*, without specifying the appropriation to be made of it, did not sustain a plea of tender of 10*s.* on the particular contract.

*Hardingham  
v. Allen.*

In *Searles v. Sudgrove*,<sup>2</sup> the defendant pleaded as to 55*l.* 6*s.*, parcel, &c., tender. Plaintiff replied that a larger sum was due at the time of the tender than the account tendered, as *one entire sum* and on *one entire contract*, which larger sum the plaintiff demanded at the time of the tender, and the defendant refused. Rejoinder, that though a larger sum was due at the time of making the tender, yet before making the tender the plaintiff was indebted to the defendant in an amount equal to the whole of the larger sum, except the said sum of 55*l.* 6*s.*, parcel, &c., for money payable, &c., which amount, &c., the defendant was and still is *ready to set off*, &c. Demurrer and joinder. The demurrer was sustained, Lord Campbell saying: that the statute 2 Geo. II. c. 22, did not cover the case, and that the defendant was bound to plead his set off, and pay the residue into court instead of tendering it. The defendant was, therefore, allowed to amend on the usual terms.

*Searles v. Sud-  
grove.*

A tender must be unconditional, or at all events free from any condition to which the creditor may rightfully object. Where there is no ambiguity in the language of the debtor, it is a question of law for the Court whether his tender was conditional or not, but if there be ambiguity, the question is properly left to the jury; as where a debtor said he had called to tender 8*l.* in *settlement* of an account, and Lord Denman, C. J., left it to the jury whether that meant simply in *payment*, or involved a condition, and this was held right by the King's Bench.<sup>3</sup>

Tender must be  
unconditional.

The condition which the debtor is the most apt to impose, Debtor has no  
right to demand

<sup>1</sup> 5 C. B. 793.

Ex. 135.

<sup>2</sup> 5 E. & B. 639; 25 L. J., Q. B. 15.  
See, also, *Robinson v. Ward*, 8 Q. B.  
920; *Phillipotts v. Clifton*, 10 W. R.,

<sup>3</sup> *Eckstein v. Reynolds*, 7 Ad. & E.  
80; *Marsden v. Goode*, 2 C. & K. 133.

admission that no more is due when making tender.

But may exclude any presumption against himself.

*Sutton v. Hawkins.*

*Marquis of Hastings v. Thorley.*

*Mitchell v. King.*

*Hough v. May.*

*Henwood v. Oliver.*

is one to which the law does not permit him to subject the creditor. The debtor has no right to insist that the creditor shall admit that no more is due in respect of the debt for which the tender is made. He may exclude any presumption against himself that he admits the payment to be only for a part, but can go no further, and his tender will not be good if he add a condition that the creditor shall acknowledge that no more is due.<sup>1</sup>

In *Sutton v. Hawkins*,<sup>2</sup> the money was tendered as "all that was due," and this was held bad.

In the *Marquis of Hastings v. Thorley*,<sup>3</sup> a tender of a sum "in payment of the half year's rent, due at Lady Day last," was held bad, by Lord Abinger, C. B., as putting on the creditor the condition of admitting that no more rent was due. The rent claimed by the plaintiff was 23*l.*, and the tender was of 21*l.*

In *Mitchell v. King*,<sup>4</sup> a tender by the debtor, who said "I do not admit of its being taken in part, but as a settlement," was held no tender.

In *Hough v. May*,<sup>5</sup> the tender was in a cheque, in these words: "Pay Messrs. Hough and Co., balance account railing, or bearer, £8 11*s.*" This was held no tender, because, as Coleridge, J., put it, "Suppose this cheque had been presented, and it had been afterwards a question for a jury whether the plaintiff had been paid in full; they would see that before the action was brought, the plaintiff had accepted and made use of a cheque professedly given for the then balance," and this condition vitiated the tender.

But in *Henwood v. Oliver*,<sup>6</sup> where the defendant produced the money, saying: "I am come with the amount of your bill," and the plaintiff refused the money, saying: "I shall

<sup>1</sup> *Bowen v. Owen*, 11 Q. B. 131.

<sup>2</sup> 8 C. & P. 259.

<sup>3</sup> 8 C. & P. 573.

<sup>4</sup> 6 C. & P. 237.

<sup>5</sup> 4 Ad. & E. 954.

<sup>6</sup> See, also, *Evans v. Judkins*, 4 Camp. 156; *Strong v. Harvey*, 3

Bing. 304; *Ford v. Noll*, 2 Dowl.

N. S. 617; *Bowen v. Owen*, 11 Q. B.

131; *Cheminant v. Thornton*, 2 C. &

P. 50; *Griffith v. Hodges*, 1 C. & P.

419; *Huxham v. Smith*, 2 Camp.

19; *Read v. Goldring*, 2 M. & S. 86.

not take that. It is not my bill," the tender was held unconditional and good. Patteson, J., said: "The defendant who makes a tender always means that the amount tendered, though less than the plaintiff's bill, is all that he is entitled to demand in respect of it. How then would the plaintiff preclude himself from recovering more, by accepting an offer of part, accompanied by expressions that are implied in every tender. *Expressio eorum quæ tacite insunt nihil operatur*. If the defendant when he paid the money had called it *part* of the amount of the plaintiff's bill, he would thereby have admitted that more was due, and the effect of the tender would have been defeated."

Henwood *v.* Oliver was followed by Wightman, J., in Bull *v.* Parker,<sup>1</sup> in a case where the witness who proved the tender, said, "I offered him 4*l.*, and I said I went by the direction of Mr. C. Parker, to pay him 4*l.* in full discharge of his account. I did not say, I will pay the money, if you will accept it in full discharge." The learned judge held, that there was no such condition annexed to the offer, as amounted to saying, "unless you accept this money in full discharge, I will not pay it at all."

The latest case on this point is Bowen *v.* Owen,<sup>2</sup> where a tenant sent a person to his landlord with a letter, saying, "I have sent with the bearer, T. T., a sum of 26*l.* 5*s.* 7½*d.*, to settle one year's rent of *Nant-y-pair*." The messenger told the landlord that he had the money with him to pay, but the latter refused, saying more was due. The messenger went away, and returned, saying, he had a few pounds more in his pocket to pay, in addition to the 26*l.* 5*s.* 7½*d.*, certain arrears of duties, but the landlord again refused, saying, there was more due. It was objected that these offers, coupled with the plaintiff's letter, were no more than a conditional tender, and Rolfe, B., so ruled, but the King's Bench held, that the letter did not contain a condition, Erle, J., stating the general rule, as follows: "The person making a tender has a right to exclude presumptions against himself, by say-

<sup>1</sup> 1 Q. B. 409.

<sup>2</sup> 11 Q. B. 130.



ing, 'I pay this as the whole that is due you;' but if he requires the other party to accept it as all that is due, that is imposing a condition; and when the offer is so made, the creditor may refuse to consider it as a tender."

Tender with protest that the amount is not due.

A tender accompanied by a protest that the amount is not due is a good tender. Lord Ellenborough was of a contrary opinion in *Simmons v. Wilmot*;<sup>1</sup> but this case must now be considered as overruled on this point by *Scott v. Uxbridge Railway Company*,<sup>2</sup> in which the Court of Common Pleas adopted and followed the ruling of Pollock, C. B., in *Manning v. Lunn*.<sup>3</sup>

Nor is a tender vitiated because the debtor says he considers it all that is due.<sup>4</sup>

A payment or tender, by one of several joint debtors or to one of several joint creditors, is valid.<sup>5</sup>

Whether at common law debtor was entitled to demand receipt?  
*Cole v. Blake*.

Whether or not the debtor was entitled at common law to demand a receipt for money tendered seems to be considered an open question.

In *Cole v. Blake*,<sup>6</sup> Lord Kenyon said that it had been determined that a party tendering money could not in general demand a receipt for the money, and quoted one case, in which he said that it had been held that the King's Receiver, as an exception to the general rule, was obliged to give a receipt.<sup>7</sup> And in *Laing v. Mender*,<sup>8</sup> where the defendant asked for a *stamped* receipt, Abbott, C. J., said: "A party has no right to say I will pay you the money if you will give me a stamped receipt, but he ought, according to the 43 Geo. III. c. 126, to bring a receipt with him, and require the other party to sign it."

*Richardson v. Jackson*.

But in *Richardson v. Jackson*,<sup>9</sup> where the Court held that the creditor could not object to the tender on the ground

<sup>1</sup> 3 Esp. 91.

<sup>2</sup> L. R. 1, C. P. 596; 35 L. J., C. P. 293.

<sup>3</sup> 2 C. & K. 13.

<sup>4</sup> *Robinson v. Ferraday*, 8 C. & P. 752.

<sup>5</sup> *Douglas v. Patrick*, 3 T. R. 683; *Wallace v. Kelsall*, 7 M. & W. 264; *Jones v. Yates*, 9 B. & C. 532; *Gordon*

*v. Ellis*, 7 M. & G. 607; *Cooper v. Law*, 6 C. B., N. S. 502; *Brandon v. Scott*, 7 E. & B. 234; 26 L. J., Q. B. 163.

<sup>6</sup> *Peake*, 179.

<sup>7</sup> *Bunbury*, 348.

<sup>8</sup> 1 C. & P. 257.

<sup>9</sup> 8 M. & W. 298.

that a receipt was asked, because at the time of the offer he only refused it on the ground that a larger sum was due him, Alderson and Rolfe, BB., were careful in guarding themselves against countenancing the rule that a man who pays money is not entitled to demand a receipt, Rolfe, B., saying: "I should be sorry to hold this to be a bad tender on account of the receipt having been mentioned. I should wish to encourage all prudent people to take receipts, for if they do not, in case of death the representatives may be deprived of all evidence of the payment."

But now, by statute,<sup>1</sup> a stamp of one penny is required on all receipts upon payment of money amounting to 2*l.*, and the debtor is empowered to tender a blank receipt, with the proper stamp, at the time of payment, which the creditor is bound to fill up, and to pay the amount of the stamp, under the penalty of 10*l.*<sup>2</sup>

16 & 17 Vict. c. 59, ss. 3, 4.

In *Jones v. Arthur*,<sup>3</sup> where the tender was made by a cheque in a letter which requested a receipt in return, this request was held not to invalidate the tender.

It is now settled by the decision of the Queen's Bench in 1860, in *James v. Vane*,<sup>4</sup> overruling *Cooch v. Maltby*,<sup>5</sup> and affirming the earlier case of *Dixon v. Watkin*,<sup>6</sup> that a tender is a *bar to the action* quoad its amount, and not merely a bar to damages.

Tender is a bar to action, not merely to damages.

The payment for goods may by the contract be agreed to take effect in a negotiable security, as in a promissory note or bill of exchange, and the agreement may be that the payment thus made is absolute or conditional. In the absence of any agreement, express or implied, to the contrary, a payment of this kind is always understood to be conditional, the vendor's right to the price reviving on non-payment of the security. But if a dispute arise as to the intention of the parties, the question is one of fact for the jury.<sup>7</sup> The

Payment by bill or note.

Absolute or conditional.

Presumed conditional, unless contrary intention shown.

<sup>1</sup> 16 & 17 Vict. c. 59, ss. 3 and 4.

<sup>2</sup> 23 L. J., Q. B. 305.

<sup>3</sup> 43 Geo. III. c. 126, ss. 5 and 6.

<sup>4</sup> 7 M. & W. 214.

<sup>5</sup> 8 Dowl. 442.

<sup>6</sup> Goldshede v. Cottrell, 2 M. & W.

<sup>7</sup> 2 E. & E. 883; 29 L. J., Q. B. 20.

intention to take a bill in absolute payment for goods sold must be clearly shown, and not deduced from ambiguous expressions, such as that the bill was taken "in payment" for the goods,<sup>1</sup> or "in discharge" of the price.<sup>2</sup> Lord Kenyon said, in *Stedman v. Gooch*,<sup>1</sup> that "the law is clear that if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt until such bill or note becomes payable and default is made in the payment; but if such bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer's in his hands, and who therefore refuses to accept it, in such case he may consider it as waste paper, and resort to his original demand, and sue the debtor:" and this *dictum* was quoted by Tindal, C. J., in *Maillard v. The Duke of Argyle*,<sup>3</sup> to show that the word "payment" does not necessarily mean payment in satisfaction and discharge.

Payment does not necessarily mean satisfaction and discharge.

The authorities in support of the rule that in the absence of stipulation to the contrary the negotiable security is only considered to be a conditional payment, defeasible on the dishonour of the security, need not be reviewed, as there is no conflict on the point.<sup>4</sup>

But if the buyer offer to pay in cash, and the vendor takes a negotiable security in preference, the security is deemed to be taken as an absolute, not a conditional, payment.<sup>5</sup> And in *Cowasjee v. Thompson*,<sup>6</sup> where the vendor elected

Where vendor elects to take bill instead of cash, payment absolute.  
*Cowasjee v. Thompson*.

<sup>1</sup> *Stedman v. Gooch*, 1 Esp. 5; *Maillard v. Duke of Argyle*, 6 M. & G. 40.

<sup>2</sup> *Kemp v. Watt*, 15 M. & W. 672.

<sup>3</sup> 6 M. & G. 40.

<sup>4</sup> *Owenson v. Morse*, 7 T. R. 64; *Kearslake v. Morgan*, 5 T. R. 513; *Puckford v. Maxwell*, 6 T. R. 52; *Kendrick v. Lomax*, 2 Cr. & Jervis, 405; *Griffiths v. Owen*, 13 M. & W. 58; *James v. Williams*, 13 M. & W. 828; *Crowe v. Clay*, 9 Ex. 604; *Belshaw v. Bush*, 11 C. B. 191; *Ford v. Beech*, 11 Q. B. 873; *Simon v.*

*Lloyd*, 2 C. M. & R. 187; *Helps v. Winterbottom*, 2 B. & Ad. 431; *Plimley v. Westley*, 2 Bing., N. C. 249; *Valpy v. Oakely*, 16 Q. B. 941; *Griffiths v. Perry*, 1 E. & E. 680; 28 L. J., Q. B. 204.

<sup>5</sup> *Marsh v. Pedder*, 4 Camp. 257; *Strong v. Hart*, 6 B. & C. 160; *Smith v. Ferrand*, 7 B. & C. 19; *Robinson v. Read*, 9 B. & C. 449; *Anderson v. Hillies*, 12 C. B. 499; 21 L. J., C. P. 150; *Guardians of Lichfield v. Green*, 1 H. & N. 884, and 26 L. J., Ex. 140.

<sup>6</sup> 5 Moore, P. C. 165.

to take a bill at six months in preference to the cash, less discount, it was held in the Privy Council that this was a "payment in substance," making it the vendor's duty to give up the ship's receipt for the goods, and thus depriving him of the right of stoppage *in transitu*.

But a man who prefers a cheque on a banker to payment in money is not considered as electing to take a security instead of cash, for a cheque is accepted as a particular form of *cash payment*, and if dishonoured, the vendor may resort to his original claim on the ground that there has been a defeasance of the condition on which it was taken.<sup>1</sup>

Taking a cheque is not such an election.

Whenever it can be shown to be the intention of the parties that a bill or note should operate as immediate payment, then the buyer will no longer be indebted for the *price of the goods*, although he may be responsible on the security: and the bill or note given in such case may be that of the buyer himself,<sup>2</sup> or that of a third person, on which the buyer has endorsed his name.<sup>3</sup>

When bill or note is taken in absolute payment, buyer no longer owes the price of the goods.

But although a bill or note be taken only as conditional payment, yet as it is *prima facie* evidence of payment, the vendor who has received it must account for it before he can revert to the original contract and demand payment of the price. In *Price v. Price*,<sup>4</sup> the defendant pleaded to an action of debt that he had given his promissory note at six months to the plaintiff, who took and received it "for and on account" of the debt. Replication, that the time had expired before the commencement of the action, &c., and that the defendant had not paid. Special demurrer, assigning for causes, that the replication did not show that the plaintiff held the note, and that it was consistent with the replication that the note might have been endorsed away,

Vendor must account for bill or note, even when received only as conditional payment, before he can sue for the price.  
*Price v. Price*.  
Rule of pleading in such cases.

<sup>1</sup> *Everett v. Collins*, 2 Camp. 515; *Guardians of Lichfield v. Green*, 1 Smith v. Ferrand, 7 B. & C. 19; *per* H. & N. 884; 26 L. J., Ex. 140.  
*Patteson, J.*, in *Pearce v. Davis*, 1 M. & Rob. 365; *Hough v. May*, 4 A. & E. 954; *Caine v. Coulson*, 1 H. & C. 764; 32 L. J., Ex. 97.

<sup>2</sup> *Sard v. Rhodes*, 1 M. & W. 153; *Brown v. Kewley*, 2 B. & P. 518; *Camidge v. Allenby*, 6 B. & C. 381; *Lewis v. Lyster*, 2 C. M. & R. 704.

<sup>3</sup> *Sibree v. Tripp*, 15 M. & W. 23;

<sup>4</sup> 16 M. & W. 232.

and payable to some other person. Joinder in Demurrer. Held, after consideration, Parke, B., giving the judgment of the Court, that it lay on the defendant to make the first averment that the note had been endorsed away, it being *his own note*, which he was bound to pay, and not on the plaintiff to aver the negative in his replication; overruling *Mercer v. Cheese*; <sup>1</sup> but *secus*, if it had been the note of a third person.

Reason why vendor must account for the security.

It will be perceived that it was taken for granted in the above case that the vendor could not recover the price if he had parted with the negotiable security, and the reason is obvious, for the buyer would thus be compelled to pay twice, once to the vendor, and again to the holder of the bill; and the vendor would thus receive payment twice, once when he passed away the bill, and again when he obtained the price. And on this principle it was held, in *Bunney v. Poyntz*, <sup>2</sup> that the vendor who had negotiated the bill without making himself liable, had converted the conditional into an absolute payment. The facts were that his agent, who had received the buyer's notes in payment, discounted them with the agent's banker, giving his own endorsement. The vendor had not endorsed them. Held, that the vendor had received payment, and could not recover from the buyer, though the notes were not paid and the agent had become bankrupt. Plainly, if the vendor had been allowed to recover, the buyer would still have remained liable to pay a second time to the banker who held his notes.

*Bunney v. Poyntz.*  
Vendor who has negotiated bill without endorsing it converts conditional into absolute payment.

*Miles v. Gorton.*

Remarks on this case.

But where the vendor had endorsed the note received on paying it away, it was held, in *Miles v. Gorton*, <sup>3</sup> that on the bankruptcy of the buyer, his lien of unpaid vendor revived. The learned author of *Smith's Mercantile Law* <sup>4</sup> observes of this case, with what seems great propriety, that although the vendor was responsible for the bill he had endorsed and passed away, yet till he had actually paid it he ought not to have been allowed to sue for the price of the goods sold, on the general principle that it is a good defence to an action

<sup>1</sup> 4 M. & G. 804.

<sup>2</sup> 4 B. & Ad. 568.

<sup>3</sup> 2 C. & M. 504.

<sup>4</sup> P. 539.

for any debt that a negotiable bill given for it is outstanding in other hands.<sup>1</sup>

If the bill or note given in payment by the buyer be not his own, but that of some third person, on which he has not put his name, and is therefore only secondarily liable, then it lies upon the vendor to allege and prove the dishonour of it in an action against the buyer for the price;<sup>2</sup> and the vendor in such a case is bound to use due diligence in taking all the steps necessary to obtain payment of the security, and to preserve the rights of the buyer against all the parties to the instrument who were liable for its payment to the buyer when he passed it to the vendor; and in default of the performance of this duty, the buyer is discharged from the obligation of paying either the price of the goods or the bill or note given as conditional payment.

Where bill or note given by buyer is not his own, and is not endorsed by him.

Vendor must show due diligence in collecting it.

Or buyer will be discharged from payment of price.

The leading case on this subject is *Camidge v. Allenby*.<sup>3</sup> The buyer gave the vendor in payment for goods sold, at York, on Saturday, the 10th December, country bank-notes of a bank at Huddersfield. The notes were given at three o'clock in the afternoon, and the bank had stopped payment at eleven o'clock the same morning, neither party knowing the fact when the payment was made. The vendor did not circulate the notes, nor present them to the bankers for payment, and on the following Saturday, the 17th December, asked the vendee to pay him the amount of the notes, offering at the same time to return them. Held, that the notes were either taken as money, in which case the risk of everything but forgery was assumed by the party receiving them,<sup>4</sup> or that they were received as negotiable instruments, in which case the vendor had discharged the buyer by his laches.<sup>5</sup>

*Camidge v. Allenby.*

In the recent case of *Smith v. Mercer*,<sup>6</sup> the buyer gave a bill drawn by Barned's Bank in Liverpool, on London,

*Smith v. Mercer.*

<sup>1</sup> *Belshaw v. Bush*, 11 C. B. 191; 23 L. J., C. P. 24.

<sup>2</sup> *Price v. Price*, 16 M. & W. 232.

<sup>3</sup> 6 B. & C. 373.

<sup>4</sup> See, on this point, *Guardians of Lichfield v. Green*, 1 H. & N. 884; 26 L. J., Ex. 140.

<sup>5</sup> See, also, as to laches, *Bishop v.*

*Rowe*, 3 M. & S. 862; *Bridges v. Berry*, 3 Taunt. 180; *Soward v. Palmer*, 8 Taunt. 277.

<sup>6</sup> L. R. 3, Ex. 51; 37 L. J., Ex. 24. But see *Swingard v. Bowes*, 5 M. & S. 62; *Van Wart v. Woolley*, 3 B. & C. 439; and *Hitchcock v. Humfrey*, 5 M. & G. 563.

on the 20th February. The vendor put it in circulation, and the bill was not presented for acceptance in London till the 23rd April, when it was dishonoured, Barsed's Bank having failed on the 19th April. *No notice of dishonour was given to the buyer*, and it was held, that he was discharged; the Court holding, as in *Camidge v. Allenby*, that the vendor either took the bill as cash, in which case there was no liability; or as a negotiable security, and then the buyer could not be in a worse position than if he had endorsed the bill, and was therefore entitled to notice as an endorser, in default whereof, he was discharged.

Country bank notes.

But in the case of country bank-notes there would be no laches in the mere failure to present the notes for payment at the bankers' on finding that they had failed, if the notes were returned to the buyer within a reasonable time.<sup>1</sup>

Vendor cannot recover price if he has lost the bill given in conditional payment.

In *Crowe v. Clay*,<sup>2</sup> in Exchequer Chamber, it was held, reversing the judgment of the Exchequer of Pleas,<sup>3</sup> that the vendor could not recover the price of the goods sold when he had lost the acceptance given by the buyer, and could not return it. Of course, if the lost bill were afterwards found, the right would revive.<sup>4</sup>

Or if he has altered the bill given to him.

In *Alderson v. Langdale*,<sup>5</sup> the vendor was held to have lost his right to recover against the buyer by altering the bill given in payment so as to vitiate it, and thus destroying the buyer's recourse against antecedent parties, Lord Tenterden agreeing with the rest of the Court that his ruling to the contrary, at *Nisi Prius*, was erroneous. But where the buyer is the party *primarily* liable, so that he is not injured by losing recourse on any antecedent parties in consequence of the alteration, the vendor may recover on the original contract after the term of credit has expired,<sup>6</sup> notwithstanding the alteration.

But where buyer loses no recourse on antecedent parties by the alteration, vendor may recover price.

Rolt v. Watson.

It was held, in *Rolt v. Watson*,<sup>7</sup> that the vendor could recover on the original contract, even without producing a

<sup>1</sup> *Robson v. Oliver*, 10 Q. B. 104;  
*Rogers v. Langford*, 1 C. & M. 637.

<sup>2</sup> 9 Exch. 604.

<sup>3</sup> 8 Ex. 295.

<sup>4</sup> *Dent v. Dunn*, 3 Camp. 296.

<sup>5</sup> 3 B. & Ad. 661.

<sup>6</sup> *Atkinson v. Handon*, 2 A. & E. 628.

<sup>7</sup> 4 Bing. 273.

negotiable security given to him by the buyer in payment, on proof that the bill drawn to the vendor's order had been lost without endorsement by him, and could not therefore be negotiated. But this case was overruled in *Romuz v. Crowe*,<sup>1</sup> and the rule now is that if the instrument was negotiable in form, there can be no recovery on the original contract without producing it; otherwise if the bill or note was not negotiable in form.<sup>2</sup>

Overruled in  
*Romuz v.*  
*Crowe.*

If a bill or note be endorsed, and given by the buyer to the vendor, merely as a collateral security, the duty of the vendor is the same as if the bill had been given in conditional payment; and if he neglect to present, or to give notice of dishonour to the buyer, the buyer will be discharged from liability on the bill, and the laches will operate so as to constitute the bill absolute payment for its amount.<sup>3</sup>

Where bill is  
given as colla-  
teral security,  
vendor's duty.

In one case where goods were sold for cash, the buyer refused to pay cash, and gave the vendor his own dishonoured acceptance, past due, and the payment was held good, in the absence of fraud. But the case proceeded on the ground of an implied assent to this mode of payment by the vendor, who had not returned his dishonoured acceptance when sent to him in lieu of cash.<sup>4</sup>

Where buyer in  
a sale for cash  
gave vendor his  
own dishonoured  
note.

When the agreement is that the price of the goods sold shall be paid in a negotiable security, held by the buyer, to which he is no party, and for the payment of which he is not to be answerable, this may be considered as a species of barter, as was said by Lord Ellenborough in *Read v. Hutchinson*.<sup>5</sup> Or the bills given by the buyer may be deemed to have passed as cash, just as if they were Bank of England notes, as was said in *Camidge v. Allenby*,<sup>6</sup> and in *Guardians of Lichfield v. Green*.<sup>7</sup> If the securities thus passed, how-

Where bills are  
given for the  
price on which  
the buyer is not  
to be responsi-  
ble.

<sup>1</sup> 1 Ex. 167; and see *Hansard v. Robinson*, 7 B. & C. 90.

S. 728; 32 L. J., C. P. 266.

<sup>2</sup> *Wain v. Bailey*, 10 A. & E. 616; *Ramuz v. Crowe*, 1 Ex. 167; *Price v. Price*, 16 M. & W. 232-243; *Hansard v. Robinson*, 7 B. & C. 90.

<sup>4</sup> *Mayer v. Nyas*, 1 Bing. 311.

<sup>5</sup> 3 Camp. 352.

<sup>6</sup> 6 B. & C. 373.

<sup>7</sup> 1 H. & N. 884; 29 L. J., Ex. 140. And see *Fyddell v. Clark*, 1 Esp. 447.

<sup>3</sup> *Peacock v. Pursell*, 14 C. B., N.



Where forged securities are given in payment.

Securities known by the buyer to be worthless.

Sale for bills or for approved bills.

Hodgson v. Davies.

Payment to agents.

Who are agents to receive price?

Factors are.

Brokers, not.

ever, were forged or counterfeited; or if not what on their face they purport to be, as if they appeared to be foreign bills needing no stamp, but were really domestic bills, invalid for want of a stamp, the vendor would have the right to rescind the sale for failure of consideration, as explained in the Chapter on that subject.<sup>1</sup> And if the securities, though genuine, were known to the buyer to be worthless when he passed them, his conduct would be deemed fraudulent,<sup>2</sup> and the vendor would be entitled to rescind the sale, and bring trover for the goods, as shown in the Chapter on Fraudulent Sales.<sup>3</sup>

In *Hodgson v. Davies*,<sup>4</sup> Lord Ellenborough held, where a sale was made on credit for bills at two and four months:

1st. That the vendor must accept or reject the bills offered within a reasonable time, and five days were held too long a time to reserve the right of rejection.

2nd. That a sale for bills, does not mean *approved bills*, and parol evidence to that effect is not admissible when the written contract mentions "bills" only.

3rd. That an *approved bill* means a bill to which no reasonable objection could be made, and which ought to be approved.

Payment properly made to a duly authorised agent of the vendor is, of course, the same as if made to the vendor himself. Without entering into the general doctrines of the law of agency, it may be convenient to point out that in contracts of sale certain agents have been held entitled to receive payment from their known general authority. Thus, a factor is an agent of a general character, entitled to receive payment and give discharge of the price;<sup>5</sup> but a broker is not, for he is not entrusted with the possession of the goods.<sup>6</sup> In *Kaye v. Brett*,<sup>7</sup> Parke, B., delivering the

<sup>1</sup> *Ante*, Book III. Ch. 1.

<sup>2</sup> *Read v. Hutchinson*, 3 Camp. 352; *Noble v. Adams*, 7 Taunt. 59; *Stedman v. Gooch*, 1 Esp. 3; *Hawse v. Crowe*, R. & Mood. 411; *per Bayley, J.*, in *Camidge v. Allenby*, 6 B. & C. 373—382.

<sup>3</sup> *Ante*, p. 318, *et seq.*

<sup>4</sup> 2 Camp. 530.

<sup>5</sup> *Drinkwater v. Goodwin*, Cowp. 251; *Hornby v. Lacy*, 6 M. & S. 166; *Fish v. Kempton*, 7 C. B. 687.

<sup>6</sup> *Baring v. Corrie*, 2 B. & A. 187; *Campbell v. Hassell*, 1 Stark. 233.

<sup>7</sup> 5 Ex. 269; *Jackson v. Jacob*, 5 Scott, 79.

judgment of the Court, said: "If a shopman, who is authorised to receive payment over the counter only, receives money elsewhere than in the shop, the payment is not good." In *Barrett v. Deere*,<sup>1</sup> Lord Tenterden held, that payment to a person sitting in a counting-room, and appearing to be entrusted with the conduct of the business, is a good payment; and the same learned judge held a tender under similar circumstances to be valid.<sup>2</sup>

Shopmen.

Person with  
apparent au-  
thority.

An auctioneer employed to sell goods, has in general authority to receive payment for them, but the conditions of the sale may be such as show that the vendor intended payment to be made to himself, and in such case a payment to the auctioneer would not bind the vendor.<sup>3</sup>

Auctioneers.

A wife has no general authority to receive payment for a husband, and a payment to her of money even earned by herself will not bind the husband, without proof of authority express or implied.<sup>4</sup>

A wife.

The general rule of law is, that an agent who makes a sale may maintain an action against the buyer in respect of his privity, and the principal may also maintain an action, in respect of his interest;<sup>5</sup> but where the agent has himself an interest in the sale, as for example, a factor or auctioneer, for his lien, a plea of payment to the principal is no defence to an action for the price by the agent, unless it show that the lien of the agent has been satisfied.<sup>6</sup>

Purchaser from  
agent cannot  
pay principal  
so as to defeat  
agent's lien.

In the recent case of *Catterall v. Hindle*,<sup>7</sup> a full exposition of the law as to the authority to receive payment conferred on agents to sell, was given in the decision pronounced by Keating, J. It is not necessary to give the

Payment to  
agent must be  
in money in  
usual course of  
business.

<sup>1</sup> M. & M. 200.

<sup>2</sup> *Willmott v. Smith*, M. & M. 238.

<sup>3</sup> *Sykes v. Giles*, 5 M. & W. 645; see *Capel v. Thornton*, 2 C. & P. 352; *Williams v. Millington*, 1 H. Bl. 81; *Williams v. Evans*, L. R. 1, Q. B. 352; 35 L. J., Q. B. 111.

<sup>4</sup> *Offley v. Clay*, 2 M. & G. 172.

<sup>5</sup> *Per* Lord Abinger, in *Sykes v. Giles*, 5 M. & W. 645.

<sup>6</sup> *Williams v. Millington*, 1 H. Bl. 81; *Drinkwater v. Goodwin*, Cowp.

251; *Robinson v. Rutter*, 4 E. & B. 954; 24 L. J., Q. B. 250, in which *Coppin v. Walker*, 7 Taunt. 237, and *Coppin v. Craig*, 7 Taunt. 243, are reviewed.

<sup>7</sup> L. R. 1, C. P. 186; 35 L. J., C. P. 161. The decision in this case was reversed on appeal, the Exchequer Chamber being of opinion that the case involved a question of fact which had not been submitted to the jury. L. R. 2, C. P. 368.

facts, somewhat complicated, to which the law was applied. The principles were thus stated: "That a broker or agent employed to sell, has *prima facie* no authority to receive payment, otherwise than in money, according to the usual course of business, has been well established; and it seems equally clear that if, instead of paying money, the debtor writes off a debt due to him from the agent, such a transaction is not payment as against the principal, who is no party to the agreement, though it may have been agreed to by the agent; see the judgment of Abbott, C. J., *Russell v. Bangley*, 4 B. & A. 398; *Todd v. Reid*, 4 B. & A. 210; the authority of which, upon this point, is not affected by the correction as to a fact by Parke, B., in *Stewart v. Aberdeen*, 4 M. & W. 224. It has also been held by this Court, in the case of *Underwood v. Nicholls*,<sup>1</sup> that the return to the agent of his cheque, cashed for him by the debtor a few days before, was not part payment as against the principal. 'It amounts to no more,' said Jervis, C. J., 'than the debtor seeking to discharge his debt to the principal, by writing off a debt due to him from the agent, which he has no right to do.' We think the present case the same in principle with *Underwood v. Nicholls*." \* \* \*

*Del credere* commission does not change agents' authority in this respect.

It is right to notice, though it was not pressed in argument as creating a distinction, that Armitage acted under a *del credere* commission from the plaintiff. We think this makes no material difference as to the question raised in the case. The agent selling upon a *del credere* commission,<sup>2</sup> receives an additional consideration for extra risk incurred, but is not thereby relieved from any of the obligations of an ordinary agent as to receiving payments on account of his principal."<sup>3</sup>

<sup>1</sup> 17 C. B. 239; 25 L. J., C. P. 79.

<sup>2</sup> A *del credere* commission was defined by Lord Ellenborough in *Morris v. Cleasby* (4 M. & S. 566), as "the premium or price given by the principal to the factor for a guarantee." Disapproval was expressed by his Lordship of the *dicta* in *Grove v. Dubois*, 1 T. R. 112 and

*Houghton v. Matthews*, 3 Bos. & P. 489. See, also, *Story on Agency*, § 33.

<sup>3</sup> See, also, *Bartlett v. Pentland*, 10 B. & C. 760; *Underwood v. Nicholls*, 17 C. B. 239; 25 L. J., C. P. 79; *Favenc v. Bennett*, 11 East,

In *Williams v. Evans*,<sup>1</sup> the terms of an auction sale were that purchaser should pay down into the hands of the auctioneer a deposit of 5s. in the pound in part payment of each lot, remainder on or before the delivery of the goods. The sale was on 2nd November, and the goods to be taken away by the evening of the 3rd. A purchaser of some of the goods at first sale having failed to comply with the conditions, his lot was resold on the 4th on the same conditions, and bought by the defendant, and delivered to him on the 7th. On that day the plaintiff, doubting the auctioneer's solvency, told the defendant not to pay him any money. The defendant proved that he had paid the auctioneer on the 4th a part of the price in money, and had given him for the remainder a bill of exchange for 15*l.* 7*s.* on the 5th November, accepted by a third person, which was paid on the 9th, and that the auctioneer had agreed to take this bill as cash. The jury found the payment to be a good one. Held, not a good payment for the 15*l.* 7*s.*, the auctioneer having no authority to accept the bill as cash, but *semble*, it might have been a good payment if made by cheque, if the jury had found it to be so; in accordance with the *dictum* of Holt, C. J., in *Thorold v. Smith*.<sup>2</sup>

*Williams v. Evans.*  
Auctioneer has no authority to receive an acceptance as cash.

*Semble, secus*  
as to cheque.

In *Ramazotti v. Bowring*,<sup>3</sup> the facts were that the plaintiff in an action of debt for wine and spirits supplied to the defendant, gave evidence that he was the owner of a business carried on under the name of "The Continental Wine Company," and that the goods had been delivered by that company to the defendant. It was proven, however, that one Nixon, the plaintiff's son-in-law, had been employed by him as clerk and manager in the business, and had told the defendant that the business was his own, and had agreed to furnish the goods to the defendant in part payment of a debt due by Nixon to the defendant. The goods were receipted for as follows:—

Agent in possession representing himself as owner.  
*Ramazotti v. Bowring.*

<sup>1</sup> L. R. 1, Q. B. 352; 35 L. J., Q. B. 111.

<sup>2</sup> 7 C. B., N. S. 851; 29 L. J., C. P. 30.

<sup>3</sup> 11 Mod. 87.

18th October, 1858.

Mr. Bowring,—Please receive twelve bottles Martell's brandy.

R. A. ARUNDELL.

From the Continental Wine Company. G. RAMAZOTTI.

Arundell, who signed the receipt, was one of the defendants in the action. Invoices were sent for other goods, not containing the plaintiff's name, but headed "The Continental Wine Company," and in one, the words "J. Nixon, Manager," were written underneath. The learned Common Serjeant left to the jury the question whether Nixon or the plaintiff was the owner of the business, telling them that if Nixon was the owner, the verdict should be for the defendants, but that if the plaintiff was the owner, he was entitled to recover. The Court held this a misdirection, Erle, C. J., saying: "The proper question to have asked the jury would have been, whether they were of opinion that the plaintiff had enabled Nixon to hold himself out as being the owner of these goods, and whether Nixon did in fact so hold himself out to the defendants as such owner. Then, if the jury should find that such was the case, I am of opinion that an undisclosed principal, adopting the contract which the agent has so made, must adopt it *in omnibus*, and take it, therefore, subject to any right of set-off which may exist." The learned judges all intimated, however, that there had been no contract of sale at all, that the goods had been misappropriated by the agent, and that the plaintiff might have recovered in trover for the tort, but that in an action on the contract, he was bound to adopt the whole contract.<sup>1</sup>

Pratt v. Willey. In Pratt v. Willey,<sup>2</sup> it appeared that the defendant, a tailor, made a bargain with one Surtees to furnish him clothes on credit, for which Surtees agreed to furnish the defendant coals on credit, which he represented as belonging to himself, and gave a card, on which was written, "Surtees, coalmerchant, &c." The coals really belonged to the plaintiff, who had employed Surtees as his agent to sell them,

<sup>1</sup> See, also, *Semenza v. Brinsley*, *Piercy*, 7 B. & S. 515.  
34 L. J., C. P. 161; *Drakeford v.*      <sup>2</sup> 2 C. & P. 350.

and when the coals were sent, *the name of the plaintiff was on the tickets as the seller*. On these facts, Best, C. J., told the jury that the defendant ought to have made inquiries into the nature of the situation of Surtees, and should not have dealt with him as principal. The question was left to the jury, who found for the plaintiff.

Where the purchaser owes more than one debt to the vendor, and makes a payment, it is his right to apply, or, in technical language, appropriate, the payment to whichever debt he pleases. If the vendor is unwilling to apply it to the debt for which it is tendered, he must refuse it, and stand upon his rights, as given to him by law, whatever they may be. And it makes no difference that the creditor may say he will not accept the payment as offered, if he actually receive it, for the law regards what he *does*, not what he *says*.<sup>1</sup> And if money be received by the creditor on account of the debtor, without the latter's knowledge, the right of the debtor to appropriate it cannot be affected by the creditor's attempt to apply it as he chooses before the debtor has an opportunity of exercising his election.<sup>2</sup>

Appropriation of payments. Buyer has the right to make the appropriation.

Money received by creditor on account of debtor without debtor's knowledge.

The debtor's election of the debt to which he applies a payment may be shown otherwise than by express words. A payment of the exact amount of one of several debts was said by Lord Ellenborough<sup>3</sup> to be "irrefragable evidence" to show that the payment was intended for that debt: and in the same case, where the circumstances were that the debtor owed one debt past due, and another not yet due, but the latter was guarantied by a security given by his father-in-law, these facts, connected with proof of an allowance of discount by the creditor on a payment made, were held conclusive to show that the debtor intended to favour

Appropriation by debtor may be shown by implication from circumstances.

<sup>1</sup> *Peters v. Anderson*, 5 Taunt. 596; *Simson v. Ingham*, 2 B. & C. 65; *Mills v. Fowkes*, 5 Bing. N. C. 455; *Croft v. Lumley*, 5 E. & B. 648; 25 L. J., Q. B. 73; and in error, 27 L. J., Q. B. 321, and 6 H. of L. C. 672; *Waller v. Lacy*, 1 M. & G. 54; *Jones v. Gretton*, 8 Ex. 773.

<sup>2</sup> *Waller v. Lacy*, 1 M. & G. 54.

<sup>3</sup> *Marryatt v. White*, 2 Starkie, 101. See, also, *Shaw v. Picton*, 4 B. & C. 715; *Newmarch v. Clay*, 14 East, 239; *Plumer v. Long*, 1 Stark. 153; *Kirby v. Duke of Marlborough*, 2 M. & S. 18; *Williams v. Rawlinson*, 3 Bing. 71.

his surety, and to appropriate the payment to the debt not yet due. So if a debtor owe a sum personally, and another as executor, and make a general payment, he will be presumed to have intended to pay his personal debt.<sup>1</sup>

Rule of appropriation where account current is kept between the parties.

Where an account current is kept between parties, as a banking account, the leading case is *Clayton's case*,<sup>2</sup> in which Sir William Grant, the Master of the Rolls, said: "There is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably it is the sum first paid in that is first drawn out: it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side; the appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts." This case was followed and approved in *Bodenham v. Purchas*;<sup>3</sup> but although the rule was recognised as sound in *Simson v. Ingham*,<sup>4</sup> and *Henniker v. Wigg*,<sup>5</sup> it was held that the circumstances of the case may afford grounds for inferring that the transactions of the parties were not intended to come under the general rule. In *Field v. Carr*,<sup>6</sup> the Court said that the rule had been adopted in all the Courts of Westminster Hall.

If debtor does not appropriate, creditor may.

Appropriation by creditor lawful, even to a debt not recoverable by action.

The cases already cited on this point also establish the rule that whenever a debtor makes a payment without appropriating it expressly or by implication, he thereby yields to his creditor the right of election in his turn. In the exercise of this right, the creditor may apply the payment to a debt which he could not recover by action against the defendant, as a debt barred by limitation,<sup>7</sup> and even a debt of which the consideration was illegal,<sup>7</sup> as a debt contracted

<sup>1</sup> *Goddard v. Cox*, 2 Str. 1194.

<sup>6</sup> 5 Bing. 13.

<sup>2</sup> 1 Merivale, 572.

<sup>7</sup> *Mills v. Fowkes*, 5 Bing. N. C.

<sup>3</sup> 2 B. & A. 39.

455; *Williams v. Griffith*, 5 M. & W.

<sup>4</sup> 2 B. & C. 65.

300; *Ashby v. James*, 11 M. & W.

<sup>5</sup> 4 Q. B. 792. See, also, *Stoveld v. Eade*, 4 Bing, 154.

542.

in violation of the Tippling Acts.<sup>1</sup> But if no appropriation be made by either party in a case where there are two debts, one legal and the other void for illegality, as where one debt was for goods sold, and the other for money lent on a usurious contract, the law will apply the payment to the legal contract.<sup>2</sup>

It has been held, however, that this doctrine will not apply in cases where there never was but *one* debt between the parties, as in the case of a building contract with a corporation not competent to contract save under seal, where it was held that the builder, who had supplied extra work on verbal orders, could not apply any of the general payments to the discharge of his claim for the extra work, that not being a debt at all against the corporation, either equitable or legal.<sup>3</sup>

But there must be more than one existing debt to permit election.

It was held by the King's Bench, in *Simson v. Ingham*,<sup>4</sup> that creditors who had appropriated a payment by entries in account in their own books, they being the bankers of the debtor, were at liberty to change the appropriation within a reasonable time if they had not rendered accounts in the interval to the debtor, their right of election not being determined by such entry till communicated to the debtor.

Creditor's election not determined till communicated to debtor.

In a case where the buyer had bought from a broker two parcels of goods belonging to different principals, and had made a payment to the broker on account, larger than either debt, but not sufficient to pay both, without any specific appropriation, the King's Bench held, that on the insolvency of the broker, the loss must be borne proportionably by his two principals, and that the appropriation must be made by apportioning the payment *pro ratâ* between them according to the amount due them respectively, leaving to each a claim against the buyer for the unpaid balance of the price of his own goods.<sup>5</sup>

*Pro ratâ* appropriation of payment.

<sup>1</sup> *Dawson v. Remnant*, 6 Esp. 24, approved in *Laycock v. Pickles*, 4 B. & S. 507; 33 L. J., Q. B. 48; *Philpot v. Jones*, 2 A. & E. 41; *Crookshank v. Rose*, 5 C. & P. 19; S. C. 1 Mod. & R. 100.

<sup>2</sup> *Wright v. Laing*, 3 B. & C. 165.

<sup>3</sup> *Lamprell v. Billericay Union*, 3 Ex. 283.

<sup>4</sup> 2 B. & C. 65.

<sup>5</sup> *Favenc v. Bennett*, 11 East, 36.



American law  
where bills or  
notes are given  
in payment.

In America, the common law rule is reversed in some of the States, and in Massachusetts, Vermont, Maine, and Arkansas, it is held that where a promissory note or bill of exchange is given for the price of goods, it is *prima facie* an absolute payment, though the presumption may be rebutted.<sup>1</sup>

French law.

By the French Civil Code, Art. 1271, it is declared that "novation" takes place "when a debtor contracts towards his creditor a new debt which is substituted for the old one that is extinguished." Novation is included in Ch. V. as being one of the modes by which debts become extinct. Under this article, and the Article 1273, which provides that "novation is not presumed, and the intention to novate must result clearly from the act," there has been quite a divergence of opinion among the commentators on the Code, and a conflict in the judicial decisions as to the effect of giving a negotiable instrument for the price of goods sold where the vendor has given an unqualified receipt for the price; but in the absence of an unreserved and unconditional receipt, all agree that the buyer's obligation to pay the price is not novated.<sup>2</sup>

Appropriation  
of payments.

The French Code gives the debtor the right to "impute" a payment to the debt that he chooses, Art. 1253; but he cannot apply money towards payment of the capital of a debt while arrearages of interest are due, and if a general payment is made on a debt bearing interest, the excess only, after satisfying interest already due, will be appropriated to payment of the capital. Art. 1254. And where no appropriation is made at the time of payment, the law applies the money to that debt, amongst such as are past due, which the debtor is most interested in discharging; but to a debt past due in preference to one not yet due, even if the debtor has a greater interest in discharging the latter than the former: if the debts are of the same nature, the appro-

<sup>1</sup> Story on Sales, 218, where the cases are cited.      compared and cited in Sirey, Code Civ. Annoté, Art. 1271.

<sup>2</sup> See the cases and authors com-

priation is made to the oldest : if all are of the same nature and the same date, the appropriation is made proportionably. The creditor is never allowed to elect without the debtor's assent. Art. 1255.

The law of tender is quite different on the Continent from our law. There, a debtor is allowed to make payment to his creditor by depositing the amount which he admits to be due in the public treasury, in a special department, termed Caisse des Consignations. This is as much an actual payment as if made to the creditor in person, and the money thus deposited bears interest at a rate fixed by the state. This deposit or "consignation" is made extra-judicially, but the debtor must cite his creditor to appear at the public treasury at a fixed time, and notify him of the amount he is about to deposit; and the public officer draws up a report or "procès-verbal" of the deposit, and if the creditor is not present, sends him a notice to come and withdraw it. Code Civ., Arts. 1257, *et seq.* This system is derived from the Roman law, in which the word "obsignatio" had the same meaning as the French "consignation."

Tender under  
the French  
law.

According to the ancient civil law, the rules bore a strong Roman law. resemblance to those of the common law, in regard to payment and tender. Whenever the sum due was fixed, and the date of the payment specified either by the law or by force of the contract, it was the debtor's duty to pay without demand,<sup>1</sup> according to the maxim that in such cases, dies interpellat pro homine; and the default of payment was said to arise *ex re*.<sup>2</sup> But in all other cases, a demand (*interpellatio*) by the creditor was necessary, which was required to be at a suitable time and place, of which the judge (or prætor) was to decide in case of dispute, and the default in payment on such demand was said to arise *ex persona*.<sup>3</sup>

<sup>1</sup> Dig. 13. 3 de Conduct. Trit. 4, Justin.  
Gaius: 19. 1 de Act. Emp. et Vend. 47,  
Paul: 45. 1 de Verb. obl. 114, Ulp.:  
Code 4. 49. de Act. Empt. 12, Const.

<sup>2</sup> Dig. 40. 5. de Fidei-com. libert. 26  
§ 1, Ulp.: 22. 32. Marcian.  
<sup>3</sup> Dig. *ubi supra*

On the refusal of the creditor to receive (*creditoris mora*), when the debtor made a tender (*oblatio*), the discharge of the debtor took place by his payment of the debt (*obsignatio*), into certain public offices or to certain ministers of public worship: "*Obsignatione totius debitæ pecuniæ solemniter facta, liberationem contingere manifestum est,*" the *obsignatio* being made in *sacratissimas ædes*, or if the debtor preferred, he might apply to the prætor to name the place of deposit.<sup>1</sup>

By Roman law payment could be made by any one in discharge of the debtor.  
As to common law, *quære*.

And payment by *whomsoever made* liberated the debtor. "*Nec tamen interest quis solvat utrum ipse qui debet, an alius pro eo; liberatur enim et alio solvente, sive sciente, sive ignorante debitore vel invito solutio fiat.*"<sup>2</sup> On this point the law of England is not yet settled, as stated by Willes, J., in *Cook v. Lister*,<sup>3</sup> and the rule would rather seem to be that payment by a third person, a stranger to the debtor, without his knowledge, would not discharge the debtor.<sup>4</sup>

Acceptilatio, or fictitious payment and release.

Mr. Smith, in his book on *Mercantile Law*,<sup>5</sup> also calls attention to the very singular sham or imaginary payment used in Rome as a substitute for a common law release, known as *acceptilatio*. "*Est acceptilatio imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, si id velit Titius remittere, poterit sic fieri, ut patiatür hæc verba debitorem dicere: quod ego tibi promisi, habes ne acceptum?*" et Titius respondeat, *habeo*. Quo genere ut diximus tantum exsolvuntur obligationes quæ ex verbis consistunt, non etiam cæteræ. Consentaneum enim visum est, verbis factum obligationem, aliis posse dissolvi." <sup>6</sup> The learned author adds, that though this sort of sham payment was applicable only to a debt due by express contract, "an acute

<sup>1</sup> Cod. 4. 32. de Usuris, 19, Const. Philipp.: 8. 43 de Solution. 9, Const. Diocl. et Max.

<sup>2</sup> Inst. lib. 3, tit. 29, 1.

<sup>3</sup> 13 C. B., N. S. 548; 32 L. J., C. P. 121.

<sup>4</sup> See *Belshaw v. Bush*, 11 C. B.

191; 22 L. J., C. P. 24; *Simpson v. Eggington*, 10 Ex. 845; 24 L. J., Ex. 312; *Lucas v. Wilkinson*, 26 L. J., Ex. 18; 1 H. & N. 420.

<sup>5</sup> Page 583, note.

<sup>6</sup> Inst. 3, 30, 1.

person," called Gallus Aquilius, devised a means of converting all other contracts, into express contracts to pay money, and then get rid of them by the *acceptilatio*, a device termed in honour of its inventor, the *Aquiliana stipulatio*. This statement is quite accurate, the Aquilian stipulation being recognized in the Institutes of Justinian.<sup>1</sup> This "acute person" was a very eminent lawyer, the colleague in the prætorship, and friend of Cicero (*collega et familiaris meus*),<sup>2</sup> and of great authority among the jurisconsults of his day, "*Ex quibus, Gallum maxime auctoritatis apud populum fuisse;*"<sup>3</sup> especially for his ingenuity in devising means of evading the strict rigour of the Roman law,—which was quite as technical as the common law ever was,—and of tempering it with equitable principles and remedies.<sup>4</sup>

<sup>1</sup> Lib. 3. 29. 2.

Pomp.

<sup>2</sup> De Officiis, lib. 3, § 14.

<sup>4</sup> See, for another example, Dig.

<sup>3</sup> Dig. 1 2. de Orig. Jur. 2, § 42,

28. 2. 29. pr. f. Scævola.

# BOOK V.

## BREACH OF THE CONTRACT.

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### PART I.

#### RIGHTS AND REMEDIES OF THE VENDOR.

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#### CHAPTER I.

##### PERSONAL ACTIONS AGAINST THE BUYER.

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##### SECTION I.—WHERE THE PROPERTY HAS NOT PASSED.

Where the property has not passed, vendor's sole remedy is action for damages.

WHEN the vendor has not transferred to the buyer the property in the goods which are the subject of the contract, as has been explained in Book II.: as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery: the breach by the buyer of his promise to accept and pay can only affect the vendor by way of damages. The goods are still his. He may resell or not at his pleasure. But his only action

against the buyer is for damages for non-acceptance; he can in general only recover the damage that he has sustained:<sup>1</sup> not the full price of the goods. The law, with the reason for it, was thus stated by Tindal, C. J., in delivering the opinion of the Exchequer Chamber in *Barrow v. Arnaud*:<sup>2</sup> "Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy.<sup>3</sup> So if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them."

Reason of the law.

The date at which the contract is considered to have been broken, is that at which the goods were to have been delivered, not that at which the buyer may give notice that he *intends* to break the contract and to refuse accepting the goods.<sup>4</sup>

Date of the breach.

And on this principle was decided the case of *Boorman v. Nash*,<sup>5</sup> in which the facts were that in November, 1825, the plaintiff sold goods to the defendant, deliverable in the months of February and March following. The defendant became bankrupt in January. The goods were tendered and not accepted at the dates fixed by the contract, and resold at a heavy loss. The loss would have been much smaller if the goods had been sold in January, as soon as the buyer became bankrupt. Held, that the contract was not rescinded by the bankruptcy; that the assignees had the right to adopt it; that the vendor was not bound to resell

*Boorman v. Nash.*  
Purchaser's bankruptcy before time fixed for delivery.

<sup>1</sup> *Laird v. Pim*, 7 M. & W. 478.

<sup>2</sup> 8 Q. B. 604—609. See, also, *Maclean v. Dunn*, 4 Bingh. 722; *Busk v. Davis*, 2 M. & S. 403; *Phillpotts v. Evans*, 5 M. & W. 475; *Gainsford v. Carroll*, 2 B. & C. 624; *Boorman v. Nash*, 9 B. & C. 145; *Valpy v. Oakley*, 16 Q. B. 941; 20 L. J., Q. B. 381; *Griffiths v. Perry*, 1 E. & E. 680; 28 L. J., Q. B. 204; *Lamond v. Duvall*, 9 Q. B. 1030;

*Boswell v. Kilborn*, 15 Moore, P. C. C. 309.

<sup>3</sup> But this is not always the rule as to purchaser's damages. See *post*, Part II. Ch. 1.

<sup>4</sup> *Phillpotts v. Evans*, 5 M. & W. 475; *Leigh v. Patterson*, 8 Taunt. 540; *Ripley v. McClure*, 4 Ex. 345; *Boswell v. Kilborn*, 15 Moore, P. C. C. 309.

<sup>5</sup> 9 B. & C. 145.

before the time for delivery, and that the true measure of damages was to be calculated according to the market price at the dates fixed by the contract for performing the bargain.

*Cort v. Ambergate Railway Company.*

Where purchaser gives notice to vendor that he will not receive goods ordered, vendor is not bound to go on making them.

The rules of law on this subject were fully discussed in *Cort v. Ambergate Railway Company*,<sup>1</sup> in which the cases were reviewed, and the judgment of the Queen's Bench delivered by Lord Campbell, C. J. The case was an action for damages by a manufacturer against a railway company for breach of a contract to accept and pay for certain railway chairs, part of which had been delivered, when the plaintiff received orders from the defendant to make and send no more. The plaintiff, thereupon, discontinued making them, although he was in a position to continue the supply according to the contract. The manufacturer had made a sub-contract for a part of the goods which he had promised to supply to the defendants, and was compelled to pay 500*l.* to be released from this sub-contract; and had made contracts for supplies of the necessary iron, and had built a large foundry for the manufacture of the chairs. Two questions were presented: *first*, whether the plaintiff could recover without actually making and tendering the remainder of the goods, the declaration alleging that they were ready and willing to perform their contract until a refusal and wrongful discharge by the defendants, and that the defendants had wholly and wrongfully prevented and discharged the plaintiffs from supplying the said residue; *secondly*, what was the proper measure of damages. Lord Campbell said, in relation to *Phillpotts v. Evans*,<sup>2</sup> that it had been properly decided, but that the Exchequer of Pleas had not determined in that case that the vendor would not have the right of treating the bargain as broken, *if he chose to do so*, as soon as the buyer gave him notice that he would not accept the goods, without being compelled afterwards to make a tender of them: and that the true point, decided in *Ripley v. McClure*,<sup>3</sup> was that a refusal by the buyer to accept

<sup>1</sup> 17 Q. B. 127; 20 L. J., Q. B. 455; *ante*, Conditions, p. 423, *et seq.* 460; and see *Hochster v. De la Tour*, 2 E. & B. 678; 22 L. J., Q. B.

<sup>2</sup> 5 M. & W. 475.

<sup>3</sup> 4 Ex. 345; and see *Avery v.*

in advance of the arrival of the cargo he had agreed to purchase was not necessarily a breach of contract, but that if unretracted down to the time when the delivery was to be made, it showed a *continuing refusal* dispensing the vendor from the necessity of making tender. His Lordship then said that a like *continuing refusal*, unretracted, appeared in the facts of the case under consideration, and then laid down the following rule:—

“On the whole, we think we are justified on principle, and without trenching on any former decision, in holding that where there is an executory contract for the manufacturing and supply of goods from time to time to be paid for after delivery, if the purchaser, having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more, as he has no occasion for them, and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of the contract, and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods, and that he prevented and discharged the plaintiff from manufacturing and delivering them.”

On the question of damages, Coleridge, J., had told the jury at *Nisi Prius* that the plaintiff ought to be put in the same position as if he had been permitted to complete the contract. This direction was approved, the learned Chief Justice saying that “the jury were justified in taking into their calculation all the chairs which remained to be delivered, and which the defendants refused to accept.”

Measure of damages in such a case.

Although in general the vendor's recovery in damages is limited to the difference between the price fixed in the contract and the market value on the day appointed for delivery, according to the rule as stated by Parke, B., in *Laird v. Pim*,<sup>1</sup> that “a party cannot recover the full value of a

In certain special cases the vendor may recover the whole price of goods though the ownership remains vested in himself.

*Bowden, Reid v. Hoskins*, 6 E. & B. 418, 3, 5.

953, 961; 25 L. J., Q. B. 49, 55; 26 1 7 M. & W. 478.



Dunlop v.  
Grote.

chattel, unless under circumstances which import that the *property has passed* to the defendant, as in the case of goods sold and delivered where they have been absolutely parted with and cannot be sold again," there may be special terms agreed on, in conflict with this rule. A vendor may well say to a buyer, "I want the money on such a day, and I will not sell unless you agree to give me the money on that day, whether you are ready or not to accept the goods;" and if these terms be accepted, the vendor may recover the whole price of goods the property of which remains vested in himself. In such a case the buyer would be driven to his cross action if the vendor, after receiving the price, should refuse delivery of the goods.<sup>1</sup>

In some cases vendor may consider contract rescinded when partially executed, and recover the value of the goods delivered.

Bartholomew v.  
Markwick.

The vendor may in some cases, under an executory contract partially performed, be entitled to consider the contract *as rescinded*, and recover on a *quantum valebant* for the goods actually delivered. Thus, in *Bartholomew v. Markwick*,<sup>2</sup> the plaintiffs had contracted to supply the defendant with such furniture as he should require to the amount of 600*l.* or 700*l.*, payable half in cash, and half by bill at six months. After some of the goods had been delivered, the defendant became displeased, and wrote to the plaintiffs,— "I now close all further orders, and desire what I have not purchased be taken off my premises,—I will not be responsible for them, &c., &c." The defendant kept goods of the value of 88*l.* 17*s.* 6*d.*, and on action brought for goods sold and delivered, insisted that the plaintiffs ought to have declared specially, and could not recover on the common counts before the expiration of the six months for which a bill was to have been given, but *held* by the whole Court, that the plaintiffs on receiving the defendant's letter had "a right to elect, if they would treat the contract as rescinded, and to sue for the value of the goods which had been delivered," on the authority of *Hochster v. De la Tour*,<sup>3</sup>

<sup>1</sup> *Dunlop v. Grote*, 2 Car. & K. 153.

<sup>2</sup> 15 C. B., N. S. 710; 33 L. J., C. P. 145.

<sup>3</sup> 2 El. & Bl. 678; 22 L. J., Q. B. 455; and see *Inchbald v. The Western Neilgherry Coffee Company*, 17 C. B., N. S. 733; 34 L. J., C. P. 15.

and cases of a like character, referred to *ante*, p. 422, *et seq.*, in the chapter on Conditions.

#### SECTION II.—WHERE THE PROPERTY HAS PASSED.

When by the contract of sale the property in the goods has passed to the buyer, the vendor may, under certain circumstances hereafter to be considered, exercise rights on the goods themselves, if the buyer make default in payment; but whenever the goods have reached the actual possession of the buyer, the vendor's *sole* remedy is by personal action. He stands in the position of any other creditor to whom the buyer may owe a debt; all special remedies in his favour *quâ* vendor are gone.

None but personal action where goods are in actual possession of buyer.

By the law of England, differing in this respect from the civil law, the buyer's default in paying the price will not justify an action for the rescission of the contract, unless that right be expressly reserved.

Nature of his personal action.

The principle at common law is, that the goods have become the property of the buyer, and that the vendor has agreed to take for them the buyer's *promise* to pay the price. If then the buyer fail to pay, the vendor's remedy is limited to an action for the breach of *that* promise, the damages for the breach being the amount of the price promised, to which may be added interest.

Cannot rescind sale for default in payment of price.

The leading case on the subject is *Martindale v. Smith*,<sup>1</sup> in which Lord Denman, C. J., delivered the opinion of the Queen's Bench after advisement. His Lordship said: "Having taken time to consider our judgment, owing to the doubt excited by a most ingenious argument, whether the vendor has not a right to treat the sale as at an end, and re-invest the property in himself, by reason of the vendee's failure to pay the price at the appointed time, *we are clearly of opinion that he had no such right*, and that the action (trover) is well brought against him. For the sale of a specified chattel on credit, though that credit may be

<sup>1</sup> 1 Q. B. 395. See, also, *Tarling v. Baxter*, 6 B. & C. 360; *Dixon v. Yates*, 5 B. & Ad. 313.

limited to a definite period, transfers the property in the goods to the vendee, giving the creditor a right of action for the price, and a lien upon the goods if they remain in his possession, till that price be paid. But that *default of payment does not rescind the contract.*"

It is not proposed in this treatise to enter into any discussion of questions of procedure, but it may be stated generally, that the vendor may recover the price of goods sold, where the property has passed to the buyer, on the common counts for goods *bargained and sold*, and goods *sold and delivered*; but that where the property has not passed, the declaration must be special for not accepting.<sup>1</sup>

The declaration must also be special where the payment is to be made by bill or note, or partly in cash and partly by bill, and the vendee refuses to give either, unless the vendor chooses to wait until the term of credit has expired, in which case he can recover on the common counts.<sup>2</sup>

But if the vendee give notice on a partially executed contract for a sale on credit that he will not carry it out, and yet retain the goods already sent, the vendor having the legal right to consider the contract as rescinded, may at once bring action on the new contract resulting from the buyer's conduct, and recover on the common counts the value of the goods delivered.<sup>3</sup>

Where the buyer has given a bill in payment, the vendor must account for the bill if dishonoured, and cannot recover the price if the bill be outstanding.<sup>4</sup>

<sup>1</sup> Chitty on Contracts, p. 406, 8th ed.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Bartholomew v. Markwick*, 15 C. B., N. S. 711; 33 L. J., C. P. 145.

<sup>4</sup> *Ante*, p. 541.

## CHAPTER II.

### UNPAID VENDOR'S REMEDIES AGAINST THE GOODS— GENERAL PRINCIPLES.

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WHERE the property in goods has passed by a sale, the *right of possession* also passes, but is, as we have seen, defeasible on the insolvency of the buyer, or the non-performance of conditions precedent or concurrent imposed on him by the contract.

If the goods have been delivered into the *actual possession* Goods may be

either in possession of the buyer;

or of the vendor;

or in transit for delivery to buyer.

Vendor has at least a lien for unpaid price on goods while in his possession unless waived.

of the buyer, all right on them is gone, as has been stated in a preceding chapter; but if not so delivered, the goods may be placed in two different conditions of fact as regards their actual custody. They may be still in the actual possession of the vendor, (or of his agents or bailees, which amounts to the same thing,) or they may have been put *in transit* for delivery to the buyer, and thus in the *actual possession* of neither party to the contract. When thus in transit, the law gives to the unpaid vendor the right of intercepting them if he can, and thereby of preventing them from reaching the actual possession of an *insolvent* buyer. This is the right well known in the law of sale as that of stoppage *in transitu*.

When the goods have not yet left the actual possession of the vendor, he has at common law *at least* a lien for the unpaid price, because he is always presumed to contract, unless the contrary be expressed, on the condition and understanding that he is to receive his money when he parts with his goods. But he may agree to sell on credit, that is, to give to the buyer immediate possession of the goods, and trust to his promise to pay the price *in futuro*. Such an agreement as this amounts plainly to a waiver of the lien, and if the buyer then exercises his rights and takes away the goods, nothing is left but a personal remedy against him. But if we now suppose, that after a bargain in which the lien has thus been unequivocally waived, the buyer for his convenience, or any other motive, has left the goods in the custody of the vendor, until the credit has expired, and has then made default in payment, or has become insolvent *before* the credit has expired, What are the vendor's rights? He has agreed to relinquish his lien, and the goods are not yet in transit. Does his lien revive, on the ground that the waiver was conditional on the buyer's maintaining himself in good credit? Or can the vendor exercise a *quasi* right of stoppage *in transitu*,—a right that might perhaps be termed a stoppage *ante-transitum*? The true nature and extent of the vendor's rights in this intermediate state of things have not yet perhaps been in all cases precisely

defined; but they have been considered by the Courts under such a variety of circumstances, that in practice there is now but little difficulty in advising on cases as they arise.

Before reviewing the authorities, attention must be recalled to the different meanings of the word "delivery," as pointed out in Book IV. Part 2, Ch. 2. For it will appear in the investigation of the present subject, that the vendor is frequently considered by the courts as being in actual possession of the goods, when he has made so complete a delivery as to be able to maintain an action for goods sold and delivered. Thus, for instance, in the whole class of cases where the delivery has been effected by the consent of the vendor to assume the changed character of bailee for the buyer, it will be seen that the unpaid vendor is still deemed to be in the *actual possession* of the goods for the purpose of exercising his remedies on them, in order to obtain payment of the price: and this, even in a case where the vendor gave a written paper acknowledging that he held the goods for the buyer, and subject to the buyer's orders.<sup>1</sup>

Meaning of the word "delivery" in this connection.

It will be convenient to review, in the first place, the cases which establish the existence of this peculiar right in the unpaid vendor who has waived his lien, and then to treat separately his remedies, 1st, of resale; 2nd, of lien; and 3rdly, of stoppage *in transitu*.

Division of the subject.

The leading cases of *Bloxam v. Sanders*,<sup>2</sup> and *Bloxam v. Morley*,<sup>3</sup> (which were said by Blackburn, J., in 1866,<sup>4</sup> to be still correct expositions of the "peculiar law" as to unpaid vendors,) were decided by the King's Bench in 1825. Bayley, J., stated the principles as follows: "The vendor's right in respect of his price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering

*Bloxam v. Sanders*.

Nature and extent of unpaid vendor's claim on the goods.

<sup>1</sup> *Townley v. Crump*, 4 Ad. & E. 58, and other cases examined *post*.

<sup>2</sup> 4 B. & C. 941.

<sup>3</sup> 4 B. & C. 951.

<sup>4</sup> In *Donald v. Suckling*, 35 L. J., Q. B. at p. 237.

the goods, the vendee is immediately entitled to the possession; and the right of possession and the right of property vest at once in him; but *his right of possession is not absolute*; it is liable to be defeated if he become insolvent before he obtains possession. *Tooke v. Hollingworth*, 5 T. R. 215. If the seller has despatched the goods to the buyer, and insolvency occur, he has a right, in virtue of his original ownership, to stop them *in transitu*. Why? Because the *property* is vested in the buyer so as to subject him to the risk of any accident; but he has not an indefeasible right to the *possession*, and his insolvency, without payment of the price, defeats that right. The buyer, or *those who stand in his place*, may still obtain the right of possession if they will pay or tender the price, or they may still act on their right of property, if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of property and right of possession are both requisite, unless they have both those rights." The assignees of the insolvent buyer were therefore held not entitled to maintain trover against the unpaid vendor, who had sold the goods on credit, but who still held them in his own warehouse.

*Miles v. Gorton.*

In 1833, *Miles v. Gorton*<sup>1</sup> was decided in the Exchequer. The vendor sold hops on credit, and kept them in his warehouse *on rent charged to the buyer*. The buyer dealt with the hops as his own, and sold part of them, which were delivered to the sub-vendee on the buyer's order. The buyer then became bankrupt, and his assignees brought trover for the remainder in the vendor's warehouse; but the Court held that as against them the vendor had the right to retain possession till payment of the price.

*Townley v. Crump.*

In *Townley v. Crump*,<sup>2</sup> decided in 1836, the defendants, wine merchants in Liverpool, sold to one Wright a parcel of

<sup>1</sup> 2 C. & M. 504.

<sup>2</sup> 4 Ad. & E. 58.

wine held by them in their own bonded warehouse there, for an acceptance at three months, and gave him an invoice describing the wines by marks and numbers, and handed him the following delivery order:—"Liverpool, 29th September, 1834. Mr. Benjamin Wright. We *hold to your order* 39 pipes and 1 hhd. red wine marked J C J M. No. 41 a 67—69 a 80—pipes, No. 105 hhd., rent free to 29 November next. John Crump and Co." The bill accepted by Wright was dishonoured; a fiat in bankruptcy issued against him on the 28th January, 1835, and his assignees brought trover against the vendor. It was admitted "that the invariable mode of delivering goods sold while in warehouses in Liverpool is by the vendors handing to the vendees delivery orders." Lord Abinger, C. B., before whom the cause was tried at the Liverpool Assizes, refused to receive evidence that the order in question was equivalent to an accepted delivery order, or that the witness (a broker and merchant holding bonded vaults in Liverpool) would consider the possession of such an order as possession of the property; but permitted him to say that, in his opinion, the possession of the order would obtain credit for the holder with a purchaser, and that, as a matter of custom, the goods specified in such an order would be considered the property of the person holding the order. His Lordship directed a nonsuit, which the King's Bench, in Banc, refused to set aside, Lord Denman giving the opinion of the Court, composed of himself and Patteson, Williams, and Coleridge, JJ., in these words: "There was a total failure of proof that where a vendor, who is himself the warehouseman, sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates by reason of this custom to prevent a lien from attaching, and I think it is not contended that there is any general usage which could divest the right in such a case, *upon the insolvency of the vendee*. Cases have been cited, but none where the question arose between the *original vendor and vendee*." It is impossible to imagine a clearer case than this of the vendor's agreement to change the character of his posses-

Unpaid vendor  
does not lose  
his rights on  
goods by agree-



ing to hold as  
bailee of the  
buyer.

sion into that of bailee for the buyer; but this sort of delivery was not allowed so to operate as to force the vendor to give up the goods to the buyer's assignees in bankruptcy. Yet it cannot be doubted that the vendor had done all that he was bound to do in performance of his contract before the buyer's insolvency, and that he could have maintained an action for goods sold and delivered.

Dodsley v.  
Varley.

Next came, in 1840, the case of *Dodsley v. Varley*,<sup>1</sup> which arose under the Statute of Frauds, and the question was whether the vendor had lost his lien, for if not, it was conceded that there was no actual receipt to take the case

Unpaid vendor's  
right may exist  
by special con-  
tract after ac-  
tual possession  
taken by buyer.

out of the statute. The facts were that a parcel of wool was bought by the defendant while it was in the plaintiff's possession: the price was agreed on, but the wool would have to be weighed: it was then *removed to the warehouse of a third person*, where the defendant collected wool purchased from various persons, and packed it in sheeting provided by himself. There it was weighed, together with other wools, and packed, but not paid for. It was the usual course for the wool to remain at this place till paid for. On these facts it was held that the wool in the warehouse was in the *defendant's* warehouse, "and that he was in *actual possession* of it there as soon as it was weighed and packed. \* \* \* Consistently with this, however, the plaintiff had, not what is commonly called a lien determinable on the loss of possession, but a *special interest*, sometimes, but improperly, called a lien, *growing out of his original ownership, independent of the actual possession*, and consistent with the *property* being in the defendant."

Valpy v. Oake-  
ley.

Where bills  
given to vendor  
have been dis-  
honoured he  
may retain  
goods undeli-  
vered.

In 1851, *Valpy v. Oakeley*<sup>2</sup> was decided in the Queen's Bench. The defendant sold 500 tons of iron to one Boydell, to be delivered in three parcels of 100, 200, and 200 tons, and to be paid for by Boydell's acceptance of the vendor's bills drawn on him. Invoices of the iron *to be* delivered were sent to the buyer, with bills drawn on him for the

<sup>1</sup> 12 Ad. & El. 632.

<sup>2</sup> 16 Q. B. 941; 20 L. J., Q. B. 380.

price, which bills he accepted and returned to the vendor. The first bill was paid; the other two were not paid, and the buyer subsequently became bankrupt. These two bills were proven under the fiat, one by the vendor, and the other by a transferee of the vendor, but no dividend was received under either proof. There remained in the vendor's possession 185½ tons of the iron at the time of the bankruptcy of Boydell, and this action was brought by his assignees in *assumpsit* on the contract for the non-delivery of this portion. *Held*, that the plaintiffs could only recover such damages as the bankrupt might have recovered; and that he could only have recovered the difference between the contract price and the market price; and only nominal damages where no such difference is proven. The *ratio decidendi* in this case was distinctly, that on the dishonour of the bills given for the price, the parties were placed in the same condition as if the bills had never been given, and the contract had been to pay in ready money. All the judges treated the case as one of lien, reviving on the non-payment of the bills. Wightman, J., said: "I see nothing to distinguish this from the ordinary case of lien of an unpaid vendor. As long as the bills were running, they may be taken to have been *prima facie* payment, but they were dishonoured before the iron was delivered, and in that case I have no doubt that the vendor's lien attaches, and that he may retain his goods until he is paid." The other judges took the same view of this point, though not expressed perhaps as distinctly as by Wightman, J.

And will be responsible only for difference between the contract price and the market price.

This point came again before the same Court in *Griffiths v. Perry*,<sup>1</sup> in 1859, the judges being Crompton and Hill, neither of whom was on the bench when *Valpy v. Oakeley* was decided. The circumstances were precisely the same as in the last-named case. Crompton, J., said: "I apprehend that where there is a sale of specific chattels, to begin with, and a bill is given, there is no lien in the strict sense of the word; but if afterwards an insolvency happens, and

*Griffiths v. Perry.*

<sup>1</sup> 1 E. & E. 680; 28 L. J., Q. B. 204.

the bill is dishonoured, then the party has in my opinion a right analogous to that which a vendor who exercises the right of stoppage in transitu has. \* \* \* When goods are left in the hands of a vendor, it cannot properly be said to be a stoppage in transitu, for it is one of those cases in which the transitus has not commenced. \* \* \* It has always seemed to me, and I think it has been established in a great many cases, that there is a similar right where the transitus has not commenced; and although no right to a strict lien has ever existed, yet where goods remain in the party's hands and insolvency occurs, and the bill is dishonoured, there a right analogous to that of stoppage in transitu arises, and there is a right to withhold delivery of the goods." It was accordingly held, 1st. That the plaintiff was only entitled to nominal damages, in accordance with the decision in *Valpy v. Oakeley*. 2ndly. That it makes no difference in such cases whether the sale is of specific chattels, or an executory contract to supply goods. 3rdly. That the endorsement to a third person of a delivery order for the goods given by the vendor to the buyer, does not confer on such third person any greater rights than the buyer had. This last point had been previously settled by a direct decision of the House of Lords,<sup>1</sup> which was not cited in the case.

Nominal damages given where no actual damage proved. Whether sale is of specific chattels or of goods to be supplied. Endorsement of delivery-order confers no greater title to sub-vendee than buyer had.

The unpaid vendor may estop himself as against sub-vendee.

The rights of the unpaid vendor under the circumstances which we are now considering, are not affected by a resale to a third person, unless the vendor has by his conduct estopped himself from asserting his own rights, and we must now turn to the class of cases where the conflict of pretensions on the goods not paid for, arose between the original vendor and the sub-vendee.

Without referring specially to the early cases,<sup>2</sup> we may pass to the decision of the King's Bench in *Stoveld v. Hughes*,<sup>3</sup> in 1811. There the defendants had sold timber

*Stoveld v. Hughes*. Where vendor assented to resale, estopped to contest rights of sub-vendee.

<sup>1</sup> *M'Ewan v. Smith*, 2 H. of L. Ca. 309.

<sup>2</sup> *Slubey v. Heyward*, 2 H. Bl. 504; *Hammond v. Anderson*, 1 B. & P., N.

R. 69; *Hanson v. Meyer*, 6 East, 626; *Green v. Haythorne*, 1 Stark. 447.

<sup>3</sup> 14 East, 308.

lying at their wharf to one Dixon, and the timber was marked by mutual assent with the initials of the buyer; and the vendor promised to send it to Shoreham. The buyer gave acceptances at three months for the price. A small part was delivered, and the remainder, while still lying on the vendor's premises, was sold by Dixon to the plaintiffs, who paid the price. The plaintiffs informed the defendant of the sale by Dixon, to which the defendant answered "Very well;" and the plaintiff and the defendant then went together on the wharf of the defendant, and the plaintiff there marked the timber with his own initials and told the defendant to send no more of the timber to Dixon, and the defendant made no objection. Dixon became insolvent, his bills were protested, and the defendant refused delivery. Lord Ellenborough said, on these facts: "The defendants were the only persons who could contravene the sale and delivery to the plaintiff from the Dixons. And when that sale was made known to the defendant Hughes, he assented to it by saying 'Very well,' and to the marking of the timber by the plaintiff's agent, which took place at the same time. If that be not an executed delivery, I know not what is so." The other judges, Grose, Le Blanc, and Bayley, concurred.

In *Craven v. Ryder*,<sup>1</sup> in 1816, the vendors undertook to deliver the goods free on board to the vendee. They delivered the goods on board, and took a receipt in their own name, thereby entitling themselves to demand the bill of lading. The purchaser resold and received payment, and became insolvent without paying the original vendor. The sub-vendee obtained a bill of lading, *without the assent* of the original vendor, and it was held that he had acquired no rights against the first vendor who had never delivered the property out of his own control.

*Craven v.  
Ryder.*  
But not bound  
without such  
assent.

The next in date, and the leading case, is *Dixon v. Yates*,<sup>2</sup> in 1833. The plaintiff Dixon had bought a large number of puncheons of rum belonging to Yates, and lying

<sup>1</sup> 6 Taunt. 433.

<sup>2</sup> 5 B. & Ad. 313.

in the latter's warehouse at Liverpool. He paid for them, thus becoming possessor as well as owner. He afterwards sold forty-six puncheons, parcel of his purchase, to one Collard, a clerk in Yates's service, and gave him an invoice specifying the number and marks of each puncheon, and took Collard's acceptances for the amount of the invoice. By invariable usage in Liverpool, the mode of delivering goods sold while in warehouse is that the vendor hands to the buyer a delivery order for the goods. On a former occasion, Collard had made in the same manner a similar purchase of another parcel of the rums, and Dixon gave him delivery orders for them: but when Collard applied for delivery orders for this second purchase, Dixon refused, but said if he wanted one or two puncheons he, Dixon, would let him have them. Collard then drew two orders on Dixon for one puncheon each, and the latter gave corresponding orders on Yates, and these two puncheons were delivered to a purchaser from Collard. One of Collard's bills became due on the 16th November, and was dishonoured; and Dixon, on the 18th November, gave notice to Yates not to deliver the remaining forty-four puncheons to any one but himself, and on the 19th made a verbal, and on the 21st a written demand on Yates for the rum, but the latter refused to deliver it to Dixon. Collard had had the puncheons which he bought coopered at Yates's warehouse, and marked with the letter C. On the 28th October, before Collard's bill was due, he sold twenty-six puncheons of the rum bought from Dixon to one Kaye, receiving in payment Kaye's acceptances, which were duly honoured. On the 31st October, Kaye's cooper went to Yates's premises, and got Yates's warehouseman to go with him to the warehouse, and there marked the casks, (which were described in Collard's invoice to Kaye by marks and numbers,) with the letters J. A. K., and got the casks ready for Kaye's gauger who gauged them, and the casks were then coopered by Kaye's cooper. When the gauger first came to Yates's office, a clerk of Yates repeatedly refused permission that he should gauge the casks for Kaye, but Collard came afterwards and had it done.

Collard had taken samples of the rum when first landed on the quay, but not after it was in the warehouse.

It was held by all the judges that the possession of the vendor Dixon had never been divested: *not* by Collard's *taking the samples*, for they were not taken as part of the bulk: *not* by his *taking possession of the two puncheons* which were actually delivered to him, because it is only when delivery of part is intended to operate as delivery of the whole, that it can have that effect: *not* by the *marking*, for that is an equivocal act, and may be merely for the purpose of identifying the goods, besides which, usage required delivery orders, which had been expressly refused: *not* by the *coopering and gauging*, because that had been objected to by Yates' clerk, and was only accomplished through the unauthorised interference of Collard, availing himself of his position as clerk. Parke, J., in delivering his opinion, said: "There was no delivery to the sub-vendees, and the rule is clear *that a second vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee, under whom he claims: he gets the title defeasible on the non-payment of the price by the first vendee.* *Craven v. Ryder*, 6 Taunton, 488."<sup>1</sup>

McEwan v. Smith<sup>2</sup> was decided in the House of Lords in 1849. The facts were that certain sugars were imported by the respondents Smith, and warehoused for their account by their agent at Greenock, named James Alexander, in a bonded warehouse of Little and Co. The entry on the warehouse book was, "Received from James Alexander for J. and A. Smith." The respondents sold the sugar to Bowie and Co., and gave them an order dated 15th August, 1848, *on Alexander*, directing him to deliver to the purchasers "the under-noted 42 hhds. of sugar, ex St. Mary, from Jamaica, in bond." The sale was for a bill at four months. Bowie and Co. never claimed the delivery, and on the 26th September one of the vendors wrote to their agent Alexander, "I have just heard of Bowie and Co.'s failure.

McEwan v.  
Smith.  
Effect of deli-  
very order.

<sup>1</sup> See Griffiths v. Perry, *ante*, p. 571.

<sup>2</sup> 2 H. of L. C. 309.

Take immediate steps to secure our 42 hhds. of sugar ex St. Mary, lately sold them, if they are still in warehouse." In the mean time, however, the appellants McEwan had bought the sugar from Bowie and Co., and on the 25th September they sent to the office of Alexander and produced there the original delivery order of Smith and Co., which had been endorsed to them by Bowie and Co. Alexander's clerk, thereupon, gave them this note: "Delivered to the order of Messrs. McEwan and Sons, this date, forty-two hogsheads of sugar, ex St. Mary. James Alexander, *per* J. Adams." Alexander, when he received Smith's letter, removed the sugar to another warehouse, and wrote to them on the 27th September: "The order for these sugars was presented on the evening of the 25th inst. in the usual way; but the young man that came with it from the agents of Messrs. McEwan said that he wished them put in my books as delivered to these gentlemen; and from the order of delivery being transferred to them, my young man (for I was not within at the time) noted in the little book in which the weights are taken when weighing over, 'delivered to Messrs. McEwan *per* order of 25th Sept. 1843,' and at their request he gave them a slip of paper to this effect." On these facts Messrs. McEwan claimed that the goods had been delivered to them, and brought their action in Scotland for the goods.

It seems manifest, on the face of the transaction, that Messrs. McEwan acted under the mistaken impression that Alexander held the goods as a warehouseman, for they only applied to have the entry of delivery *made on his books*, which they could not possibly have considered to be a delivery to them, if they had known that the sugar was in the warehouse of Little and Co. It was accordingly held by the House of Lords that nothing had been done to change the possession of the sugar up to the 26th September, when the vendor exercised his lien. Several of the learned Lords gave expositions of the nature and effect of delivery orders, and of dealings between vendors and sub-vendees, in constituting delivery of possession, and in vest-

ing title in a sub-vendee as against the unpaid original vendor.

The Lord Chancellor (Lord Cottenham) first said of the note given by Alexander's clerk, that it was "nonsense to say, that by that memorandum the goods were delivered." His Lordship then said: "First, it is said that though the delivery note does not pass the property as a bill of lading would have passed it, by being endorsed over from one party to another, still it operates as an estoppel upon the party giving it, so far, at all events, as a third party is concerned; and it is argued that it is a kind of fraud for a person to give a delivery note which the person receiving it may use so as to impose upon a third person, and then to deprive that third person of its benefit. But that \* \* \* merely puts the argument as to the effect of a delivery note in another form, and it assumes that such a document has all the effect of a bill of lading. But as the nature and effects of these two documents are quite different from each other, it seems to me that such an argument has no foundation at all, and cannot be adopted without converting a delivery note into a bill of lading. \* \* \* It was contended that, assuming the delivery note given to the first vendee to have no effect in changing the property, yet if the *second vendee* comes to the *original vendor* and obtains a new order, the vendor *cannot afterwards say* that he has not been paid by the first vendee, and so defeat the title of the second vendee, the sale to whom he had in fact sanctioned by making that second note, and dealing with him as a party entitled to the custody of the goods. But this argument is answered by the observation that Mr. Alexander is here assumed to have an authority which in fact he never possessed; for in truth he possessed no authority but that which the first delivery note given to Bowie and Co. had conferred upon him. \* \* \* Supposing the note of 25th Sept. to have been signed by Alexander himself, I am of opinion that it gave the second vendee no better title than the first delivery note gave to Bowie and Co. It is not possible to construe this note as a dealing between the vendors and the



*second vendee*, when in fact there was no communication whatever between them."

Lord Campbell said: "The single point in this case is, whether Smith and Co., the respondents, the original vendors of the goods, retained their lien upon them. \* \* \* If a bill of lading is given, and that is endorsed for a valuable consideration, that would take away the right of the vendor to prevent the delivery of the goods; but that is not so with a delivery order. \* \* \* It is said that the delivery order and the subsequent payment of the price by the second vendee take away the lien of the vendors. These acts do not seem to me to do so; for, first, this price was not paid to the original owners, and then to treat what passed between *other people as an estoppel to the original owners*, is to give the delivery order the effect of a bill of lading, and thus the argument again and again comes round to that point for which no authority in the usage of trade or in the law can be shown."<sup>1</sup>

As to the true nature of the unpaid vendor's right on the goods in such circumstances, his Lordship was very emphatic in repudiating any supposed analogy with stoppage *in transitu*. He said: "Several of the judges in the Court below discuss at great length the question of Stoppage *in transitu*. That doctrine appears to me to have no more bearing on this case *than the doctrine of contingent remainders*." It was in his Lordship's opinion clearly the revival of the lien, which entitles the vendor to exercise his right on goods sold originally with a waiver of lien, if the buyer becomes insolvent before the credit expires.

Pearson v.  
Dawson.

In *Pearson v. Dawson*,<sup>2</sup> the facts were that the defendant sold sugar, held in his own bonded warehouse, to one Askew, and took an acceptance for the price. Askew resold to the plaintiffs 20 hogsheads of the sugar, and gave them a delivery order in the following words:—"Mr. John Dawson: Please deliver to Messrs. Pearson and Hampton, or order, twenty hogsheads of sugar, ex Orontes [here were specified the

<sup>1</sup> See, also, *Dixon v. Bovill*, 3 McQueen, H. of L. C. 1.      <sup>2</sup> E. B. & E. 448; 27 L. J., Q. B. 248.

marks, numbers, &c.]. James Askew." This order was handed by the plaintiffs to the defendant, who wrote in pencil on his "sugar book" the plaintiffs' name opposite the particular hogsheads resold. No one could take the hogsheads out of the warehouse without paying duty, and the plaintiffs having sold two of the hogsheads, gave their own delivery order to the defendant for them, and the defendant gave the plaintiffs an order to his warehouseman to deliver them, and the plaintiffs paid the duty and took them away. In the like manner other hogsheads, making altogether eight out of the twenty, had been taken from the warehouse by the plaintiffs when Askew became insolvent; his bills were dishonoured, and the defendant then claimed his lien on the twelve remaining hogsheads. But the judges, Lord Campbell, C. J., and Coleridge and Erle, JJ., were unanimously of opinion that the original vendor was bound to state to the plaintiffs his objections, if he had any, to recognising the delivery order given by Askew when made known to him, and that having by his conduct given an implied assent to the resale, he had lost possession and right of lien, and could not contest the title of the sub-vendee.

In the latest case on the point, *Woodley v. Coventry*,<sup>1</sup> the defendants, corn-factors, sold 350 barrels of flour, to be taken out of a larger quantity, to one Clarke, who obtained advances from the plaintiff on the security of the flour, giving to the plaintiff a delivery order on the defendants. The plaintiff sent the order to the defendants' warehouse, and lodged it there, the granary clerk saying, "It is all right," and showing the plaintiff samples of the flour sold to Clarke. The plaintiff sold the flour to different persons, and the defendants delivered part of it, but Clarke having in the mean time absconded and become bankrupt, the defendants refused, as unpaid vendors, to part with any more of the flour. The plaintiff brought *trover*, and it was contended for the defendants, that the estoppel set up against them by the plaintiff could not prevail against the rule that

Vendor in such cases is estopped even from denying that the property had passed under his contract with first buyer.

<sup>1</sup> 2 H. & C. 164; 32 L. J., Ex. 185.

trover will not lie where the property is not vested; and that by the contract between the defendants and Clarke, no property had passed, because the sale was not of any specific flour, but of flour to be supplied generally, in accordance with the samples. But the Court held that the defendants were estopped also from denying that the property had passed, and refused to set aside the verdict given in plaintiff's favour.

Propositions  
deduced from  
the review of  
the authorities.

According to the foregoing authorities, an unpaid vendor in actual possession of the goods sold, even where he has relinquished his lien by the terms of his contract, has the following rights, of which he is not deprived by assenting to hold the goods as bailee of the buyer:—

*First.*—If the controversy be between the unpaid vendor and the insolvent buyer, or the assignees of the latter, the vendor may refuse to give up possession of the goods without payment of the price.<sup>1</sup>

*Secondly.*—The vendor's remedy will not be impaired by his giving a delivery order for the goods if countermanded before his bailee attorns to the buyer.<sup>2</sup>

*Thirdly.*—The rights of the unpaid vendor are the same against a sub-vendee as against the original buyer,<sup>3</sup> unless he be precluded by the estoppel resulting from his assent, express or implied, to the sub-sale when informed of it.<sup>4</sup>

These rights taken in connection with the remedy by re-sale, and the vendor's lien, treated of in the two succeeding chapters, cover almost every conceivable controversy that can arise relative to the rights of an unpaid vendor who has retained actual possession of the goods.

It will be again necessary to refer more particularly (*post*,

<sup>1</sup> *Tooke v. Hollingworth*, 5 T. R. 215; *Bloxam v. Sanders*, 4 B. & C. 941; *Miles v. Gorton*, 2 Cr. & M. 504; *Townley v. Crump*, 4 Ad. & E. 58; *Craven v. Ryder*, 6 Taunt. 433; *Dodsley v. Varley*, 12 Ad. & E. 632; *Valpy v. Oakeley*, 16 Q. B. 941; 20 L. J., Q. B. 380; *Griffiths v. Perry*, 1 E. & E. 680; 28 L. J., Q. B. 204.

<sup>2</sup> *McEwan v. Smith*, 2 H. of L.

Ca. 309; *Griffiths v. Perry*, *ut supra*.

<sup>3</sup> *Craven v. Ryder*, 6 Taunt. 433; *per Parke, B.*, in *Dixon v. Yates*, 5 B. & Ad. 313; *McEwan v. Smith*, 2 H. of L. C. 309; *Griffiths v. Perry*, *ut supra*.

<sup>4</sup> *Stoveld v. Hughes*, 14 East, 303; *Pearson v. Dawson*, E. B. & E. 448 27 L. J., Q. B. 248.

Ch. IV., On Lien) to the effect of delivery orders, but before leaving the subject of estoppel, attention may properly be directed to the cases in which it has been applied to warehousemen and bailees, who may by their conduct make themselves responsible to sub-vendees without relieving themselves of liability towards the unpaid vendor. For the doctrine of estoppel in general, the reader is referred to the notes appended to the case of *Doe v. Oliver*,<sup>1</sup> in Mr. Smith's very valuable book. The principle was thus stated by Lord Denman in *Pickard v. Sears*:<sup>2</sup> "Where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

Warehousemen may make themselves liable as bailees to both parties.

Principle on which estoppel rests.

In *Stonard v. Dunkin*,<sup>3</sup> the defendant, a warehouseman, gave a written acknowledgment that he held a parcel of malt for the plaintiff, who had advanced money on a pledge of it to one Knight. Knight became bankrupt, and the defendant attempted to show that the malt had not been measured, and that the property in it therefore passed to Knight's assignees; but Lord Ellenborough said: "Whatever the rule may be between buyer and seller, it is clear that the defendants cannot say to the plaintiff the malt is not yours, after acknowledging to hold it on his account. By so doing they attorned to him, and I should entirely overset the security of mercantile dealings were I now to suffer them to contest his title."

*Stonard v. Dunkin.*

Warehousemen estopped from setting up the rights of unpaid vendor, after attorning to purchaser as sub-vendee.

This case was followed by *Hawes v. Watson*,<sup>4</sup> in the King's Bench in 1824, and by *Gosling v. Birnie*,<sup>5</sup> in the Common Pleas in 1831, the assent of the wharfinger in the latter case being by parol. Tindal, C. J., said: "The defendant is estopped by his own admissions, for unless they amount to an estoppel the word may as well be blotted from the law."

*Hawes v. Watson.*

*Gosling v. Birnie.*

<sup>1</sup> 2 Smith's L. C. pp. 768, *et seq.*

<sup>4</sup> 2 B. & C. 540.

<sup>2</sup> 6 Ad. & E. 475.

<sup>5</sup> 7 Bing. 339.

<sup>3</sup> 2 Camp 344.

The rule has since been applied in very many cases, among which may be cited, *Gillett v. Hill*,<sup>1</sup> *Holt v. Griffin*,<sup>2</sup> *Lucas v. Dorrien*,<sup>3</sup> and *Woodley v. Coventry*; <sup>4</sup> and it was recognised in *Swanwick v. Sothern*,<sup>5</sup> and recently in the elaborate judgment delivered by Blackburn, J., in the Queen's Bench, in *Biddle v. Bond*.<sup>6</sup>

<sup>1</sup> 2 C. & M. 536.

187.

<sup>2</sup> 10 Bing. 246.

<sup>3</sup> 9 Ad. & E. 895.

<sup>3</sup> 7 Taunt. 278.

<sup>6</sup> 6 B. & S. 225, and 34 L. J., Q. B.

<sup>4</sup> 2 H. & C. 164, and 32 L. J., Ex. 137.

## CHAPTER III.

### REMEDIES AGAINST THE GOODS—RESALE.

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WE have seen that the vendor has no right to rescind the sale when the buyer is in default for the payment of the price, and this suggests at once other important questions. What is a vendor to do if the buyer, after notice to take the goods and pay the price, remains in default? Must he keep them until he can obtain judgment against the buyer and sell them on execution? What if the goods are perishable, like a cargo of fruit; or expensive to keep, as cattle or horses? May the vendor re-sell? and if so, under what circumstances? with what legal effect? Before attempting to give an answer to these questions, let us see how the law stood when Blackburn on Sales was published, in 1845. The following is the statement of the learned author:—

“ Assuming therefore what seems pretty well established, that the vendor's rights exceed a lien, and are greater than can be attributed to the assent of the purchaser under the

May vendor resell if buyer continues in default?

Law as stated in Blackburn on Sales.

contract of sale, the question arises, how much greater than a lien are they? and this is a question that in the present state of the law no one will venture to answer positively, but, as has already been said, the better opinion seems to be, that *in no case do they amount to a complete resumption of the right of property*, or in other words, *to a right to rescind the contract of sale*, but perhaps come nearer to the rights of a *pawnee with a power of sale*, than to any other common law rights. At all events, it seems that a resale by the vendor, while the purchaser continues in default, is not so wrongful as to authorise the purchaser to consider the contract rescinded, so as to entitle him to recover back any deposit of the price, or to resist paying any balance of it still due: nor yet so tortious as to destroy the vendor's right to retain, and so entitle the purchaser to sue in trover."<sup>1</sup>

Review of authorities.

Right cannot exist after tender of price by buyer.

Nor before buyer's default.

Langfoot v. Tyler.

There has been a great deal of authority on the point since the publication of Blackburn on Sales, and it will be convenient first to refer succinctly to the decisions cited by that learned author. *Martindale v. Smith*<sup>2</sup> may be at once distinguished from all the other cases cited, by the circumstance that the resale in that case was made *after the buyer had tendered the price*, a proceeding to which no countenance has been given by any *dictum* or any decided case. To the later case of *Chinery v. Viall*,<sup>3</sup> to be examined *post*, the same remark applies, the vendor having resold, *before* the buyer was in default.

In *Langfoot v. Tyler*,<sup>4</sup> Holt, C. J., ruled, in 1705, that "after earnest given, the vendor cannot sell the goods to another without default in the vendee, and therefore if the vendee does not come and pay and take the goods, the vendor ought to go and request him, and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell

<sup>1</sup> Blackburn on Sales, 325.

<sup>2</sup> 1 Q. B. 395.

<sup>3</sup> 5 H. & N. 288; 29 L. J., Ex.

<sup>4</sup> 1 Salk. 113, cited by Lord Ellenborough, in *Hinde v. Whitehouse*, 7 East, 571, and by Littledale, J., in *Bloxam v. Sanders*, 4 B. & C. 945.

them to any other person." We have already seen that by the law as now settled, the agreement is not dissolved, according to the *dictum* in this old case.

In *Hore v. Milner*,<sup>1</sup> at Nisi Prius in 1797, Lord Kenyon *Hore v. Milner.* held, that a vendor who had re-sold had estopped himself from alleging the contract to have been an executed bargain and sale, and could only recover on a count for damages, as on an executory agreement.

In *Mertens v. Adcock*,<sup>2</sup> in 1813, Lord Ellenborough held, *Mertens v. Adcock* in a case of goods sold at auction, with deposit of part of the price, and *express reservation* of power to resell, that the resale was not a rescission of the contract, and that the vendor might recover on a count for goods bargained and sold. This case has since been overruled. See *Lamond v. Duvall*, p. 587, *infra*. *overruled.*

In *Hagedorn v. Laing*,<sup>3</sup> the Common Pleas expressed a *Hagedorn v. Laing.* doubt of the correctness of Lord Ellenborough's ruling, in cases where there is an *express* reservation of the power to re-sell.

In *Greaves v. Ashlin*,<sup>4</sup> in 1813, the facts were, that the defendant sold the plaintiff fifty quarters of oats at 45*s.* 6*d.*, and resold them, on the buyer's default, at 51*s.* per quarter. Lord Ellenborough held the sale not to be rescinded by the resale, and the plaintiff recovered the profit on the resale. *Greaves v. Ashlin.*

Next came *Maclean v. Dunn*, in 1828. The vendor in that case resold the goods at a loss, after repeated requests that the buyer would take them. Best, C. J., gave the decision of the Court that the original sale was not thereby rescinded, and that the buyer might be sued in *assumpsit* on the original contract; and the reasoning was as follows: "It is admitted that *perishable articles* may be resold. It is difficult to say what may be considered as perishable articles, and what not; but if articles are not perishable, *price is*, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another.

<sup>1</sup> 1 Peake, 42, n. (58, n. in ed. 1820).

<sup>3</sup> 6 Taunt. 162.

<sup>4</sup> 3 Camp. 426.

<sup>2</sup> 4 Esp. 251.



It is a practice, therefore, founded on good sense, to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it except on the authority of decided cases. Those which have been decided do not apply. \* \* \* *We are anxious to confirm a rule consistent with convenience and law.* It is most convenient that when a party refuses to take goods he has purchased, they should be resold, and that he should be liable to the loss, if any, upon the resale. The goods may become worse the longer they are kept, and at all events there is the risk of the price becoming lower.”<sup>1</sup>

In *Blackburn on Sales*, it is said of this case, that “the dictum of the Court goes to the extent that the resale was perfectly legal and justifiable;—*probably it may be so*, but there has never been a decision to that extent.”<sup>2</sup>

*Accbal v. Levy.* In *Acebal v. Levy*,<sup>3</sup> the Common Pleas, in 1834, when Best, C. J., had been succeeded by Tindal, C. J., and when Vaughan, Bosanquet, and Alderson, JJ., had become members of the Court, subsequently to the decision in *Maclean v. Dunn*, said that it was unnecessary to decide “whether the plaintiff can or cannot maintain the count for goods bargained and sold, after he has resold the goods to a stranger, before the action brought. A question which does not go to the merit, but is a question as to the pleading only, for *there can be no doubt but that the plaintiff might, after reselling the goods, recover the same measure of damages in a special count framed upon the refusal to accept and pay for the goods bought.*”

*Milgate v. Kebble.*  
Vendee in default cannot maintain trover.

In *Milgate v. Kebble*,<sup>4</sup> decided in the Common Pleas, in 1841, the plaintiff brought *trover* upon the following facts. The defendant sold to the plaintiff his crop of apples, for 38*l.*, to be paid by instalments *before* the buyer took them away. The buyer paid 33*l.* on account, and gathered the apples on the 1st October, leaving them in the defendant's kiln. On the 27th December, the defendant wrote to the

<sup>1</sup> Bingham, 722.

<sup>2</sup> *Blackburn*, p. 337.

<sup>3</sup> 10 Bing. 376.

<sup>4</sup> 3 M. & G. 100. See, also, *Rloxam v. Sanders*, 4 B. & C. 948.

plaintiff a notice to pay for them and take them away, and this not being done, the defendant resold the apples for 6*l.*, on the 22nd January. The jury found that a reasonable time had *not* elapsed before the resale, and gave a verdict for 5*l.* damages to the plaintiff. On leave reserved, a motion for nonsuit was successful, on the ground that the vendor's right of *possession* was not lost, so as to enable the plaintiff to maintain *trover* against him. In this case, Tindal, C. J., said the buyer was in the condition of a *pledger*, who cannot bring *trover*.

In *Fitt v. Cassanet*,<sup>1</sup> the subject again came before the same Court, in 1842, but the facts did not require a direct decision on it, though the judges all assumed it to be settled law that a resale would be legal, after a refusal to accept on the part of the purchaser.

*Fitt v. Cassanet.*

Thus stood the authorities in 1845, and one of the points in dispute was settled very speedily afterwards.

In *Lamond v. Duvall*,<sup>2</sup> decided in 1847, the vendor brought *assumpsit* for shares bargained and sold, and sold and delivered. At an auction sale the defendant had become the buyer, at 79*l.*, of certain shares, one of the conditions of the sale being that the goods might be resold unless the purchase-money was paid on the following day, the bidder so making default being answerable for the loss on the resale. The vendor resold for 63*l.* Erle, J., nonsuited the plaintiff, on the ground that this reservation of the power of resale was in effect a condition for making void the sale on default of the buyer, and that the actual resale had rescinded the original contract, so that *assumpsit* could not be maintained on it. This nonsuit was upheld after advisement, the Court overruling *Mertens v. Adcock*,<sup>3</sup> and confirming the *dictum* of Gibbs, C. J., in *Hagedorn v. Laing*.<sup>4</sup> Lord Denman, C. J., said: "It appears to us that a power of resale implies a power of annulling the first sale, and that therefore the first sale is *on a condition, and not absolute*. There might be inconvenience to the vendor if the resale

*Lamond v. Duvall.*  
A resale in accordance with a right expressly reserved rescinds the original sale.

<sup>1</sup> 4 M. & G. 898.

<sup>3</sup> 4 Esp. 251.

<sup>2</sup> 9 Q. B. 1030.

<sup>4</sup> 6 Taunt. 162.

was held to be by him as *agent for the defaulter*, and there is injustice to the purchaser in holding him liable for the full price of the goods sold, though he cannot have the goods, and though the vendor may have received the full price from another purchaser. This inconvenience and injustice would be avoided by holding that the sale is conditioned to be void in case of default, and that the defaulter in case of resale is liable for the difference and expenses. \* \* \* In *Maclean v. Dunn*,<sup>1</sup> the action for damages for the loss on resale is spoken of as the proper course, where the power of resale is exercised without an express stipulation for it."

The *point* here decided is, that where there is a resale on the buyer's default in accordance with an express reservation of that right, in the original contract, the sale is rescinded.

The *dicta* are, that the vendor's remedy in case of resale at a loss is a special action for damages for the difference in price and the expenses, whether there has or has not been an express reservation of the right of resale.

Vendee's rights on resale not the same when there has been an express reservation of the power of resale, as in the contrary case.

When the sale is thus conditional, the vendee's rights are very different from those which exist in the absence of an express reservation of power to resell, and he is in *duriori casu*. He runs all the risk of resale without any chance of profit, for he has clearly no right to the surplus if the goods are sold for a higher price at the resale.<sup>2</sup> But where such express reservation does not exist, the effect of a resale not being to rescind the sale, the goods are sold by the unpaid vendor, *quà* pledgee, and as though the goods had been pawned to him: they are sold as being the property of the buyer, who is of course entitled to the excess if they sell for a higher price than he agreed to give.<sup>3</sup>

Modern cases decide that vendor has no right to resell on buyer's default.

The cases of *Valpy v. Oakeley*,<sup>4</sup> and *Griffiths v. Perry*,<sup>5</sup> cited in the preceding chapter, pp. 570—2, decide that in an action by the buyer, *on the contract*, against the unpaid

<sup>1</sup> 4 Bing. 722.

<sup>2</sup> Sugd. on Vendors, p. 39 (14th ed.).

<sup>3</sup> *Ashlin v. Greaves*, 3 Camp. 426; *Valpy v. Oakeley*, and *Griffiths v.*

*Perry*, *ante*, pp. 570—2.

<sup>4</sup> 16 Q. B. 941; 20 L. J., Q. B. 380.

<sup>5</sup> 1 E. & E. 680; 28 L. J., Q. B. 204.

vendor for non-delivery, whether the sale was of specific goods, or of goods to be supplied, the buyer can only recover the actual damages, that is, the difference between the contract price and the market value; and to this extent the buyer's right is plain, because the effect of his default was not to rescind the contract, and he is entitled to any profit on the resale. But the cases go further, and decide expressly that the vendor has no right to resell, for they determine that he is responsible for nominal damages where there is no difference in these values.

And is always liable for nominal damages, even if no actual damage be proven.

Where an unpaid vendor, *after delivery* of the goods to the buyer, tortiously retakes and resells them, the law is equally well settled that the contract is not rescinded, and the vendor may still recover the price, while the buyer may maintain an action in trover for the conversion. In these cases neither party can set up his own right as a defence in an action by the other, but must bring his cross-action. If, however, from the nature of the contract or the dealings between the parties, the vendor who has resold is in such a condition as to be unable to maintain a cross action for the price, then the buyer's damages in trover will not be the whole value of the goods converted, but only the actual damages, namely, the value of the goods, after deducting the price due. The authorities in support of these conclusions are the following:—

Where vendor tortiously retakes goods after delivery—legal effect.

In *Stephens v. Wilkinson*,<sup>1</sup> to an action on a bill of exchange, the defence was that the bill was given for goods sold, which the plaintiff had tortiously retaken from the defendant two months after the delivery. This defence was held bad, because the tortious retaking did not authorise the buyer to consider the contract as rescinded; he must pay the price, and seek his remedy by action in trespass for the retaking of his goods, inasmuch as the consideration for the bill of exchange had not wholly failed, the buyer having enjoyed the consideration for some time after the sale. Lord Tenterden said: "The person who bought the

*Stephens v. Wilkinson.*

<sup>1</sup> 2 B. & Ad. 320.

goods paid part of the purchase-money, and gave this bill for the residue; had possession of the goods delivered to him; kept them for two months, and was then dispossessed by the vendor; and it is said that entitles the defendant to refuse to pay the bill. I am, however, inclined to think that in point of law that is not, but that the vendee's remedy is by an action of trespass. In that action he will be entitled to recover a full compensation for the injury which he sustained by the wrongful seizure of the goods, and their value will be the measure of damages." Parke, J., also held, that there was not a total failure of consideration, so that of course the defence was unavailing against a bill of exchange (because no partial failure of consideration, except for an ascertained liquidated sum, is a good defence in an action on a negotiable instrument),<sup>1</sup> but that great judge gave the following as the rule of law: "No case has been cited, and no *dictum* which confirms the position that the retaking of the goods by the vendor may be treated by the vendee as a dissolution of the contract. If the goods are delivered by the vendor, and taken possession of by the vendee, his title to them is complete; the consideration for the price is then perfect. If they are afterwards forcibly taken by the vendor, the vendee may maintain trespass, and the measure of the damages would be the value of the goods at the time of the retaking; whereas, if he may treat the retaking of the goods as a rescinding of the contract, it follows as a consequence that he would be entitled to recover the whole purchase-money, or the value of the goods as agreed upon at the time of the sale, notwithstanding he may have had the use of them in the interval between the sale and the retaking, and though they may be actually deteriorated in value, as they would be if they were of a perishable nature. *In point of law the situation is this: the vendee has had all he was entitled to by the contract of sale, and he must therefore pay the price of the goods. He may bring trespass against the vendors for taking possession of them again, and*

<sup>1</sup> Byles on Bills, 126 (9th ed.).

*may recover the actual value of the goods at the time they were taken."*

The converse of this case came before the Exchequer in 1841. In *Gillard v. Brittan*,<sup>1</sup> the action was by the buyer for damages in trespass *de bonis asportatis*. The facts were that the defendant, to whom the plaintiff was indebted for goods sold, went in pursuit of the latter, (who had sold off his furniture and left his home secretly,) and having traced him to a distant place, went into the premises of the plaintiff's brother-in-law, accompanied by some police officers, and retook some of the goods sold, which he identified. The learned judge at Nisi Prius, (Wightman, J.,) told the jury that in estimating the damages, they must take into consideration the plaintiff's debt to the defendant, which would be reduced *pro tanto* by the value of the goods retaken. The jury found a verdict for the defendant. This ruling was held wrong. Lord Abinger, C. B., said: "It would lead to the consequence that a party may set off a debt due in one case against damages in another. *The verdict in this case does not at all affect the right of the defendant to recover the whole 67l. due to him from the plaintiff.* The learned judge was therefore clearly in error." Alderson, B., said that the debt due by the plaintiff "ought to have been excluded altogether, otherwise it is equivalent to allowing a set-off in trespass."

*Gillard v.  
Brittan.*

But in *Chinery v. Viall*,<sup>2</sup> in 1860, the Exchequer of Pleas held the contrary, on the following state of facts. The defendant had made a tortious resale of certain sheep sold by him to the plaintiff, and the buyer's declaration contained two counts, one on the contract, for non-delivery, and the other in trover. On the first count there was a verdict for 5*l.*, being the excess in the market value of the sheep over the price at which they had been bought. On the second count there was a formal verdict for 118*l.* 19*s.*, the whole value of the sheep, without deducting the unpaid price, with leave reserved to the defendant to move for a verdict in his

*Chinery v.  
Viall.*  
Where vendor  
tortiously re-  
sells before de-  
livery.

<sup>1</sup> 8 M. & W. 575.

<sup>2</sup> 5 H. & N. 288; 29 L. J., Ex. 180.

favour on that count, or to reduce the damages. The Court held the count in trover maintainable, in which opinion it was stated by Bramwell, B., when delivering the judgment, that Blackburn, J., concurred: and on the question of damages it was held that the plaintiff could only recover the actual loss sustained, not the whole value of the sheep for which he had not paid; and the damages were reduced to 5*l*.

Observations  
on *Gillard v.*  
*Brittan*, and  
*Chinery v.*  
*Viall*.

In this case, *Gillard v. Brittan*<sup>1</sup> was cited by counsel, and not overruled. The two cases, however, are quite distinguishable. In *Gillard v. Brittan*, each party was entitled to his cross action, the vendor for the price, the buyer for the goods, which had passed into his ownership and actual possession. But in *Chinery v. Viall* the *ratio decidendi* was that the vendor could not, by reason of his conversion *before* delivery, maintain a cross action for the price, and therefore *ex necessitate* it must be allowed for in calculating the buyer's damages in his action, for otherwise the buyer would get the goods for nothing.

Damages in  
trover not al-  
ways the full  
value of the  
goods con-  
verted.

On the point decided in *Chinery v. Viall*, namely, that in an action of trover the measure of damages is not always the full value of the goods, and that a party cannot recover more by suing on the tort than on the contract, but that the actual damage only ought to be given in either action, the case has met with full approval in subsequent decisions. It was followed by the Common Pleas, (Williams, J., *dis.*) in *Johnson v. Stear*,<sup>2</sup> which was an action in trover for a conversion of the pledge by the pawnee, the Court holding that only nominal damages could be recovered, the pledge being insufficient to satisfy the debt: and *Johnson v. Stear* was followed in its turn by the Queen's Bench in *Donald v. Suckling*.<sup>3</sup>

*Page v. Cow-*  
*asjee*.

In the recent case of *Page v. Cowasjee*,<sup>4</sup> the cases were all reviewed, and the Court, after determining, as a matter of fact, that the buyer of a vessel was not in default under

<sup>1</sup> 8 M. & W. 575.

<sup>2</sup> 15 C. B., N. S. 330; 33 L. J., C. P. 130.

<sup>3</sup> 7 B. & S. 783; 35 L. J., Q. B. 232; and *Donald v. Suckling* has

just been approved by the Ex. Ch. in *Haliday v. Holgate*, decided in June, 1868; *Weekly Notes*, p. 192.

<sup>4</sup> L. R. 1, P. C. App. 127; 3 Moore, P. C. C., N. S. 499.

the circumstances as proven in the case, and that the vendor had acted tortiously in retaking the vessel out of the buyer's possession and reselling it, held the legal effect to be, that the contract was not rescinded, that the vendor could recover the price, and that the buyer *could not set up the resale in defence*, but must bring his cross action for damages for the tortious retaking and resale, which damages would probably be measured by the price obtained at the resale.

The following summary of the law is submitted as fairly resulting from the foregoing authorities:—*First*. A resale by the vendor *on default* of the purchaser rescinds the original sale, when the right of resale was expressly reserved in the original sale;<sup>1</sup> but not in the absence of such express reservation.<sup>2</sup>

Summary of the rules of law relative to resales by vendors.

*Secondly*. The vendor's remedy, after a resale under *an express reservation of that right*, against a purchaser in default, is a special action for damages for the loss of price and expenses of the resale.<sup>3</sup> If the goods fetch a profit on the resale, the buyer derives no benefit from it, except as showing, by way of defence, that his default has caused no damage to the vendor.<sup>4</sup>

*Thirdly*. The vendor's remedy, after a resale made in the absence of an express reservation of that right, is *assumpsit* on the original contract, which was not rescinded by the resale. And in this action he may either recover as damages the actual loss on the resale composed of the difference in price and expenses,<sup>5</sup> or he may refuse to give credit for the proceeds of the resale, and recover the whole price, leaving the buyer to a cross action for damages for the resale.<sup>6</sup>

And this rule prevails even in cases where the vendor has

<sup>1</sup> *Lamond v. Duvall*, 9 Q. B. 1030.

<sup>2</sup> *Maclean v. Dunn*, 4 Bing. 722; *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Gillard v. Brittan*, 8 M. & W. 575; *Page v. Cowasjee*, L. R. 1, P. C. App. 127; 3 Moore, P. C. N. S. 499.

<sup>3</sup> *Lamond v. Duvall*, 9 Q. B. 1030.

<sup>4</sup> Sugd. on Vendors, p. 39.

<sup>5</sup> *Maclean v. Dunn*, *ut supra*.

<sup>6</sup> *Stephens v. Wilkinson*, and *Page v. Cowasjee*, *ut supra*.



tortiously retaken and resold the goods after their delivery to the purchaser.<sup>1</sup>

*Fourthly.* In the case of resale, a buyer *in default* cannot maintain trover against the vendor, being deprived by his default of that right of *possession* without which trover will not lie.<sup>2</sup>

*Fifthly.* A buyer, even if *not in default*, has no right to treat the sale as rescinded by reason of the vendor's tortious resale; and cannot get back any part of the price paid, nor refuse to pay the remainder when due. His only remedy is a cross action in damages.<sup>3</sup>

*Sixthly.* A buyer, *not in default*, may maintain trover against a vendor who has tortiously resold, and the vendor cannot have the unpaid price deducted from the damages, but must bring his cross-action;<sup>4</sup> but if the vendor is unable to maintain a cross-action for the price, then the buyer's recovery in trover will be limited to the actual damage suffered, namely, the difference between the market value of his goods which have been resold, and the unpaid price.<sup>5</sup>

*Seventhly.* An unpaid vendor, with the goods in his possession, has more than a mere lien on them; he has a special property analogous to that of a pawnee. But it is a breach of his contract to resell the goods, even on the buyer's default, for which damages may be recovered against him; but only the actual damage suffered, that is, the difference between the contract price and the market value on the resale; and if there be no proof of such difference, the recovery will be for nominal damages only.<sup>6</sup>

Title of second purchaser on resale.

Where there has been a resale, the title of the second

<sup>1</sup> *Stephens v. Wilkinson*, and *Page v. Cowasjee*, *ut supra*.

<sup>2</sup> *Milgate v. Kebble*, 3 M. & G. 100.

<sup>3</sup> *Martindale v. Smith*, 1 Q. B. 395; *Stephens v. Wilkinson*, 2 B. & Ad. 320; *Page v. Cowasjee*, L. R. 1, P. C. App. 127; 3 Moore P. C. N. S. 499.

<sup>4</sup> *Gillard v. Brittan*, 8 M. & W. 575.

<sup>5</sup> *Chinery v. Viall*, 5 H. & N. 288; 29 L. J., Ex. 180.

<sup>6</sup> *Valpy v. Oakeley*, 16 Q. B. 941; 20 L. J., Q. B. 380; *Griffiths v. Perry*, 1 E. & E. 680; 28 L. J., Q. B. 204.

purchaser depends on the fact, whether the first buyer was in default, for if not, we have seen that he may maintain trover. The subject was touched on in *Gosling v. Birnie*,<sup>1</sup> which went off on the point of estoppel, so that nothing was decided on it.

<sup>1</sup> 7 Bing. 339.

## CHAPTER IV.

### REMEDIES AGAINST THE GOODS—LIEN.

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Lien defined.

A LIEN in general may be defined to be a right of retaining property, until a debt due to the person retaining it has

been satisfied;<sup>1</sup> and as the rule of law is, that in a sale of goods, where nothing is specified as to delivery or payment, the vendor has the right to retain the goods until payment of the price,<sup>2</sup> he has in all cases *at least* a lien, unless he has waived it.

But this lien extends only to the price. If by reason of the vendee's default the goods are kept in warehouse, or other charges are incurred in detaining them, the lien does not extend to such claim, and the vendor's remedy, *if any*, is personal against the buyer. In *Somes v. The British Empire Shipping Company*,<sup>3</sup> it was held by the unanimous judgment of the Queen's Bench, the Exchequer Chamber, and the House of Lords, that a shipwright who kept a ship in his dock after repairing her, in order to preserve his lien, had *no claim at all* for dock charges against the owner of the ship for the time that elapsed between the completion of the repairs and the delivery of the ship, notwithstanding the owner's default in payment. Cockburn, C. J., in *Cam. Scacc.*,<sup>4</sup> said: "It is not for us sitting here judicially to attach to the right of lien which a *vendor* or bailee has in certain cases, a new right which it is now sought to enforce for the first time." In the House of Lords, Lord Wensleydale said: "The first point is whether if a person who has a lien on any chattel, chooses to keep it for the purpose of enforcing his lien, he can make *any claim* against the proprietor of that chattel for so keeping it. \* \* \* I am clearly of opinion that no person has by law a right to add to his lien upon a chattel, a charge for keeping it till the debt is paid; that is, in truth, a charge for keeping it for his own benefit, not for the benefit of the person whose chattel is in his possession." Lord Cranworth, who concurred, said, however, that he gave no opinion "as to what would have been the right of Messrs. *Somes*, *if they had*

Extends only to price, not to charges, &c.

*Somes v. The British Empire Shipping Company.*

<sup>1</sup> *Hammonds v. Barclay*, 2 East, 235.

<sup>2</sup> *Miles v. Gorton*, 2 C. & M. 504.

<sup>3</sup> 1 Ell. B. & E. 353; 27 L. J., Q. B. 397; in *Cam. Scacc.* 1 E. B. & E.

367; 28 L. J., Q. B. 220; in *Dom. Proc.* 8 H. of L. Ca. 338; 30 L. J., Q. B. 229.

<sup>4</sup> 28 L. J., Q. B. 221.

*claimed no lien*, but had said to the owners of the ship, when the repairs were completed, 'Your ship is fit to be taken away; it encumbers our dock, and you must take it away immediately.' If after that the shipowners had not taken it away, but had left it an unreasonable time, namely, twenty-seven days, occupying the dock, neither the Court of Queen's Bench, nor the Court of Exchequer Chamber, has expressed an opinion as to whether there might not have been, by natural inference, an obligation on the part of the owners of the ship to pay a reasonable sum for the use of the dock, for the time it was so improperly left there.<sup>1</sup> But the short question is only this, whether Messrs. *Somes* retaining the ship, *not for the benefit of the owners* of the ship, *but for their own benefit*, in order the better to enforce the payment of their demand, could then say, 'We will add our demand for the use of the dock during that time to our lien for the repairs.' The two Courts held, and I think correctly held, that they had no such right."

Lien may be  
waived when  
contract is  
formed,

or abandoned  
afterwards.

Lien waived by  
sale on credit.

The vendor's lien may of course be waived expressly. It may also be waived by implication at the time of the *formation* of the contract, when the terms show that it was not contemplated that the vendor should retain possession till payment; and it may be abandoned during the *performance* of the contract, by the vendor's actually parting with the goods before payment.

The lien is waived by implication, when time is given for payment, and nothing is said as to delivery; in other words, when goods are sold on credit. It is of course competent for the parties to agree expressly that the goods, though sold on credit, are not to be delivered till paid for; but unless this special agreement, or an established usage to the same effect in the particular trade of the parties, can be shown, selling goods on credit means *ex vi terminorum* that the buyer is to take them into his possession, and the vendor is to trust to the buyer's promise for the payment of the price at a future time.

<sup>1</sup> See *per* Lord Ellenborough, in *Greaves v. Ashlin*, 3 Camp. 426.

In *Spartali v. Benecke*,<sup>1</sup> the sale was of thirty bales of wool, "to be paid for by cash in one month, less five per cent. discount." The vendors insisted that they were not bound to deliver the goods till payment, and tendered evidence of usage of the wool trade that under such a contract the vendors were not bound to deliver without payment. Both contentions were overruled by Talfourd, J., at Nisi Prius, and it was held by the Court in Banc, *first*, that "it was clear law that where by the contract the payment is to be made at a future day, the lien for the price, which the vendor would otherwise have, is waived, and the purchaser is entitled to a present delivery of the goods without payment, upon the ground that the lien would be inconsistent with the stipulation in the contract for a future day of payment;"<sup>2</sup> and, *secondly*, that parol evidence of usage was inadmissible to contradict the terms of the written contract, which implied, if indeed they did not express, that delivery was to be made before payment.

*Spartali v. Benecke.*

But on this second point, *Spartali v. Benecke* has been overruled by the Exchequer Chamber, in *Field v. Lelean*.<sup>3</sup> There the sale was by one broker in mining-shares to another. The contract was, "Bought, Thomas Field, Esq., 250 shares, &c. at 2*l.* 5*s.* per share, 562*l.* 10*s.*, for payment, half in two, half in four months." It was held by the Court, unanimously, that parol evidence was admissible of a usage among dealers in such shares, that the delivery was to take place concurrently with, and at the time agreed on for payment. Williams, J., made some remarks with the view of suggesting a distinction between this case and *Spartali v. Benecke*, but added: "If *Spartali v. Benecke* cannot be distinguished in this way, I agree it ought to be overruled." Wightman, J., however, delivered the judgment of the whole Court, declining to make any distinction, so that upon *this*

Evidence of usage admissible to show that in a sale on credit delivery was not to be made till payment.  
*Field v. Lelean.*

<sup>1</sup> 10 C. B. 212; 19 L. J., C. P. 293.

<sup>2</sup> 6 H. & N. 617; 30 L. J. Ex. 168.

<sup>3</sup> *Chase v. Westmore*, 5 M. & S. 180; *Crawshaw v. Homfray*, 4 B. & A. 50; *Cowell v. Simpson*, 16 Vesey, Jr. 275.

See, also, cases cited in notes to *Wigglesworth v. Dallison*, 1 Sm. L. C. 551.

*point Spartali v. Benecke* must be treated as an overruled case. But its authority is unshaken in support of the principle, that a sale on credit, in the absence of a contrary stipulation express or implied from usage, is a waiver of the vendor's lien, and entitles the purchaser to delivery before payment.

Lien waived by taking bill of exchange or other security.

A vendor also waives his lien by taking from the buyer a bill of exchange or other security payable at a distant day;<sup>1</sup> and in *Chambers v. Davidson*,<sup>2</sup> Lord Westbury, in giving the decision of the Privy Council, said: "Lien is not the result of an express contract: it is given by implication of law. If, therefore, a mercantile transaction which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum.*"

Lien abandoned by delivery of the goods to the buyer.

The vendor's lien is abandoned when he makes delivery of the goods to the buyer. At what precise state of the dealings between the parties, the acts of the vendor in performance of his contract will amount to a delivery *sufficient to divest his lien*, is in some cases a matter very difficult to determine. As soon as a bargain and sale are completed, we have already seen that the buyer becomes at once vested with the ownership and the *right of possession*, but that *actual possession* does not pass by the mere contract. Something further is required, unless, indeed, the buyer had been previously in actual possession as bailee of the vendor, in which case, of course, the vendor's assent that the buyer shall thenceforth possess in his own right as proprietor of the thing would make a complete delivery for all purposes.

The "actual receipt" required by the Statute of Frauds, being possible only when the vendor has made delivery, our present inquiry has been anticipated to some extent in Book

<sup>1</sup> *Hewison v. Guthrie*, 2 Bing. N. C. 755; 3 Scott, 298; *Horncastle v. Farran*, 3 B. & A. 497.

<sup>2</sup> L. R. 1, P. C. App. 296; 4 Moore, P. C. C. N. S. 158.

I., Part 2, Ch. 4. But that inquiry had reference to the *formation* of the contract, and we must now seek for some guiding principles in the great mass of authorities for determining when the delivery by the vendor is so far advanced that he has lost his lien, and may maintain a count for goods sold and delivered.

As there must always be a delivery of possession of *part* of the goods at least to satisfy the clause of the Statute of Frauds which relates to "actual receipt," it would seem to be a natural inference that the same acts which have been held sufficient under that statute to constitute an actual receipt by the purchaser, would, if done in respect of the *whole* of the goods sold, have the like effect in determining the vendor's lien, and justifying an action for goods sold and delivered.

Delivery to divest lien not the same as to satisfy 17th sect. of Statute of Frauds.

This was the impression of the learned author of the Treatise on Mercantile Law, as shown in an elaborate note, in which the authorities are reviewed;<sup>1</sup> and this view of the law is believed to be sound, so far as regards the ability of the vendor to maintain an action for goods sold and delivered. But we have seen in a preceding chapter<sup>2</sup> that in cases where the vendor retains possession of the chattel in the changed character of bailee for the buyer, there is a clear distinction between such a delivery as would suffice under the Statute of Frauds, and a delivery sufficient to divest the vendor's lien.

Where the goods are at the time of the contract already in possession of the buyer, as agent of the vendor, the mere completion of the contract operates as a delivery of possession. There is nothing further that can be done to transfer the actual possession. If the question were as to the *formation* of the contract under the Statute of Frauds, evidence would of course be required to show that the buyer's possession had become changed from that of bailee to that of purchaser.<sup>3</sup> But after a sale has been shown to exist,

Where goods were already in possession of the buyer.

<sup>1</sup> Smith's Mer. Law, note (m), p. 495 (7th ed.).

<sup>2</sup> *Ante*, p. 567.

<sup>3</sup> *Eden v. Dudfield*, 1 Q. B. 806;



the goods being already in *actual* possession, and the effect of the contract being to transfer the *right of possession* as well as that of property, the delivery becomes complete of necessity, without further act on either side; though of course in this, as in all other cases, the parties may by agreement provide that this effect shall not take place. If A. has consigned to B. goods for sale, there is nothing in the law to prevent a contract between them by which A. sells the goods to B., coupled with a stipulation that B.'s possession shall continue to be that of a bailee for A., until the price is paid.

Where goods were in possession of bailee of the vendor.

When the goods are at the time of sale in possession of a third person, an actual delivery of possession takes place, and the vendor's lien is lost as soon as the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor, and shall become the agent of the buyer in retaining custody of them.<sup>1</sup> The cases have been reviewed, *ante*, pp. 213, *et seq.*: 575, *et seq.*

Where goods are in possession of vendor at time of sale.

The goods are generally in the vendor's possession at the time of sale, and the modes by which delivery can be effected are so various as fully to justify Chancellor Kent's remark,<sup>2</sup> that "it is difficult to select those leading principles which are sufficient to carry us safely through the labyrinth of cases that overwhelm and oppress this branch of the law." Many points, however, are free from doubt.

Delivery to common carrier divests lien.

A delivery of the goods to a common carrier for conveyance to the buyer is such a delivery of actual possession to the buyer through his agent, the carrier, as suffices to put an end to the vendor's lien.<sup>3</sup>

Lillywhite v. Devereux, 15 M. & W. 285; Taylor v. Wakefield, 6 E. & B. 765.

<sup>1</sup> Harman v. Anderson, 2 Camp. 244; Bentall v. Burn, 3 B. & C. 423; Lackington v. Atherton, 7 M. & G. 360; Farina v. Home, 16 M. & W. 119; Godts v. Rose, 17 C. B. 229; 25 L. J., C. P. 61; Bill v. Bament, 9 M. & W. 86; Lucas v. Dorrien, 7

Taunt. 278; Woodley v. Coventry, 2 H. & C. 164; 32 L. J., Ex. 185.

<sup>2</sup> 2 Kent's Com. 509.

<sup>3</sup> Dawes v. Peck, 8 T. R. 330; Waite v. Baker, 2 Ex. 1; Fragano v. Long, 4 B. & C. 219; Dunlop v. Lambert, 6 Cl. & F. 600; Johnson v. Dodgson, 2 M. & W. 653; Norman v. Phillips, 14 M. & W. 277; Meredith v. Meigh, 2 E. & B. 364; 22 L. J., Q.

Generally, a delivery of part of the goods sold is not equivalent to a delivery of the whole, so as to destroy the vendor's lien. He may, if he choose, give up part, and retain the rest; and then his lien will remain on the part retained in his possession for the price of *the whole*; but there may be circumstances sufficient to show that there was no intention to separate the part delivered from the rest, and then the delivery of part operates as a delivery of the whole, and puts an end to the vendor's possession, and consequently to his lien. The rule was stated conversely by Parke, J., in *Dixon v. Yates*,<sup>1</sup> where he said "that if part be delivered with intent to separate that part from the rest, it is not an inchoate delivery of the whole," and by Taunton, J., in *Betts v. Gibbins*,<sup>2</sup> where, in answer to counsel who maintained that a delivery of part amounts to a delivery of the whole, only when circumstances show that it is meant as such, the learned judge said, "No; on the contrary, a partial delivery is a delivery of the whole, unless circumstances show that it is not so meant;" but these *dicta* were strongly questioned by Pollock, C. B., in *Tanner v. Scovell*,<sup>3</sup> and it is submitted that the cases support the principle above stated, in accordance with the opinion of Pollock, C. B. The point is not, however, of much practical importance, as it always resolves itself into a question of intention to be determined by the jury according to all the facts and circumstances of the particular case.

Delivery of part when delivery of whole.

Always question of fact as to intention.

In *Slubey v. Heyward*,<sup>4</sup> the defendants being in possession of bills of lading which had been endorsed to them as sub-vendees of a cargo of wheat, had ordered the vessel to Falmouth, with the consent of their vendor, and there had begun receiving the cargo from the master, and had already taken out 800 bushels, when the original vendor attempted to stop the further delivery because his buyer had become

*Slubey v. Heyward.*

B. 401; *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J., Q. B. 261; *Hart v. Bush*, E. B. & E. 494; 27 L. J., Q. B. 271; *Smith v. Hudson*, 6 B. & S. 431; 34 L. J., Q. B. 145. But see *Clarke v. Hutchins*, 14 East, 475.  
<sup>1</sup> 5 B. & Ad. 313—341.  
<sup>2</sup> 2 Ad. & E. 73.  
<sup>3</sup> 14 M. & W. 28.  
<sup>4</sup> 2 H. Bl. 504.

insolvent. Held, that "the transitus was ended by the delivery of the 800 bushels of wheat, which must be taken to be a delivery of the whole, there appearing no intention, either previous to, or at the time of, delivery to separate part of the cargo from the rest."

Hammond  
Anderson.

Hammond v. Anderson<sup>1</sup> followed in the same Court. It was the case of a delivery order for all the goods given to the purchaser, and possession taken by him of part at the wharfinger's premises, and a subsequent attempt by the vendor to stop delivery of the rest.

It seems very plain that in these two cases there was a delivery of the whole, not because a part was carried away, but because the vendor's agent and bailee in each case had attorned to the buyer, and become the buyer's bailee. There was, in the case of the bill of lading, and of the delivery order, an agreement between the vendor, the buyer, and the bailee, that the last-named should thenceforth hold for account of the buyer.

Bunney v.  
Poyntz.

In Bunney v. Poyntz,<sup>2</sup> the vendee of a parcel of hay asked the vendor's permission to take a part, and this was granted, and it was held not to be a delivery of the whole.

Dixon v. Yates.

So in Dixon v. Yates,<sup>3</sup> the delivery by the vendor of two puncheons of rum out of a larger quantity was held not to be a delivery of the whole, the vendor having refused a delivery order for the whole.

Simmons v.  
Swift.

In Simmons v. Swift,<sup>4</sup> the delivery of part of a stack of bark was held not to be a delivery of the whole, but the decision was on the ground that the sale was by weight, and the part remaining had not been *weighed*.<sup>5</sup>

Miles v. Gor-  
ton.

In Miles v. Gorton,<sup>6</sup> the vendor sold a parcel of hops consisting of two kinds, twelve pockets of one, and ten pockets of the other. He rendered one invoice for the whole, which expressed that the goods remained at rent for

<sup>1</sup> 1 B. & P., N. R. 69. See, also, Tansley v. Turner, 2 Bing. N. C. 151.

<sup>2</sup> 4 B. & Ad. 568.

<sup>3</sup> 5 B. & Ad. 313.

<sup>4</sup> 5 B. & C. 857.

<sup>5</sup> See Hanson v. Meyer, 6 East, 614.

<sup>6</sup> 2 Cr. & M. 504.

account of the buyer. A bill of exchange was given in payment. The buyer sold the ten pockets of one kind, and they were delivered to his sub-vendee. He afterwards became bankrupt, his acceptance was not paid, and his assignees brought trover against the vendor for the twelve pockets remaining on hand. Follett, for the plaintiffs, declined to contend that a vendor loses his lien by merely delivering part; and he admitted the rule to be that a part delivery only operates as a constructive delivery of the whole when so intended, but he insisted that the intention was to deliver the whole. It was held by all the judges that the delivery of part did not constitute delivery of the whole, and *Harman v. Anderson* was distinguished on the ground that the goods were in the possession of a *third person*, Bayley, B., saying: "Where the goods are in the hands of a third person, such third person becomes by the delivery order the agent of the vendee instead of the vendor, and it may then well be said that the warehouse is the warehouse of the vendee as between him and the vendor. I do not think that the payment of warehouse rent to the vendor has the effect of a constructive delivery of the whole in a case where the goods remain in the possession of the vendor."

In *Tanner v. Scovill*,<sup>1</sup> the facts were that one McLaughlin bought of Boutcher and Co. certain goods on board of a vessel lying at a wharf of defendants, and the vendors gave an order for the delivery to McLaughlin, addressed to the defendants in the following terms: "Please weigh and deliver to Mr. McLaughlin 48 bales glue pieces." The defendants, on receipt of the order, weighed and sent a return of the weight to Boutcher and Co., who thereupon made an invoice, which they sent to McLaughlin, showing the price to amount to 168*l.* 1*s.* 6*d.* About a month later, the defendants delivered five of these bales to a sub-vendee of McLaughlin on the latter's order. Other vessels arrived

*Tanner v. Scovill.*

<sup>1</sup> 14 M. & W. 28. See, also, *Jones v. Jones*, 8 M. & W. 481; *Whitehead v. Anderson*, 9 M. & W. 518; *Wentworth v. Outhwaite*, 10 M. & W. 436; *Crawshaw v. Ede*, 1 B. & C. 181; *Bolton v. Lancashire and York Railway Company*, L. R. 1, C. P. 431; 35 L. J., C. P. 137.

with further goods, which were treated in the same way, by handing delivery orders to the buyer, and by having the goods weighed, and invoices sent to him. But no transfer of any of the goods was made on the defendant's books to McLaughlin, nor any rent charged to him. Another partial delivery was made to a sub-vendee of McLaughlin, and the vendors then notified the defendants to make no further deliveries, McLaughlin having failed to make them a payment according to promise, and being then in debt to them about 700*l.* McLaughlin afterwards became bankrupt, and his assignees brought this action in trover against the defendants. There was evidence at the trial in relation to some objection made by McLaughlin to the weights. *Held*, first, that the evidence failed to show that the defendants had agreed to become bailees for the buyer; and secondly, that the delivery of the part removed from the wharf was not intended to be, and did not operate as, a delivery of the whole, but was a separation for the purpose of that part only, leaving all the rest in *statu quo*.

No case where delivery of what remained in vendor's own custody is effected by previous delivery of part.

Effect of marking goods or putting them in packages.

Buyer may be let into possession as bailee of vendor.

No case has been met with where the delivery of part has been held to constitute a delivery of the remainder when kept in the *vendor's own custody*.<sup>1</sup>

A delivery of goods sufficient to divest the lien is not effected by the mere marking them in the buyer's name, or setting them aside,<sup>2</sup> or boxing them up by the purchaser's orders, and putting his name on them,<sup>3</sup> so long as the vendor holds the goods, and has not agreed to give credit on them.

On the same principle which permits the vendor to remain in custody of the goods in the changed character of bailee for the purchaser, it would seem that the buyer may be let into possession of the goods for a special purpose, or in a different character from that of buyer. Thus, A. might

<sup>1</sup> See Lord Ellenborough's remarks in *Payne v. Shadbolt*, 1 Camp. 427.

<sup>2</sup> *Goodall v. Skelton*, 2 H. Bl. 316; *Dixon v. Yates*, 5 B. & Ad. 313; *Simmons v. Swift*, 5 B. & C. 857;

*Townley v. Crump*, 4 Ad. & El. 53; *Proctor v. Jones*, 2 C. & P. 532.

<sup>3</sup> *Boulter v. Arnott*, 1 C. & M. 333.

refuse to deliver a horse sold to B., *quà* purchaser, but lend it to him for a day or a week :<sup>1</sup> might sell his horse to the stable keeper, who already has the horse at livery, and stipulate that the buyer's possession should continue that of bailee, until payment of the price. So in one case where a watch was transferred by the master of a vessel to the owners as pledgees, and they then loaned the watch to the pawnor, it was held that the pawnor possessed as agent of the pawnees, and that they could recover the watch in trover against third persons, to whom the pawnor had pledged it a second time.<sup>2</sup>

If the vendor consent to give delivery to the buyer, only on a condition, it is of course incumbent on the buyer to perform the condition before he can claim the possession. As where a vendor gave the buyer an order for goods lying in a bonded warehouse, with the understanding that the buyer was to pay the duties, it was held that on the buyer's insolvency, his assignees could not take possession of the goods without refunding the duties which the vendor had advanced on default of the buyer.<sup>3</sup> So, also, if anything is to be done to the goods before delivery, as in *Hanson v. Meyer*,<sup>4</sup> (where the goods were to be weighed), and the cases<sup>5</sup> decided on its authority.

Conditional delivery.

It is now necessary to examine the question as to the effect on the vendor's lien, of the transfer and endorsement to the buyer of the instruments known in commerce as documents of title. The statutory law will first be referred to, and it consists of the enactments known as the Factors' Acts, The Bills of Lading Act, The Legal Quays Act for the port of London, and the Sufferance Wharves Act, also for the port of London.

Delivery by transfer of documents of title.

The Factors' Acts, namely, the 4 Geo. IV. c. 83, 6 Geo. IV. c. 94, and 5 & 6 Vict. c. 39, are intended to afford

Factors' Acts. 4 Geo. 4, c. 83.

<sup>1</sup> *Tempest v. Fitzgerald*, 3 B. & A. 680; *Marvin v. Wallace*, 6 E. & B. 726; 25 L. J., Q. B. 369.

<sup>2</sup> *Reeves v. Capper*, 5 Bing. N. C. 136.

<sup>3</sup> *Winks v. Hassall*, 9 B. & C. 372.

<sup>4</sup> 6 East, 614.

<sup>5</sup> *Wallace v. Breeds*, 13 East, 522; *Busk v. Davis*, 2 M. & S. 396; *Shepley v. Davis*, 5 Taunt. 617; and see *Swanwick v. Sothorn*, 9 A. & E. 895.

6 Geo. 4, c. 94.  
5 & 6 Vict. c.  
39.

security to persons dealing with factors ; and the last-mentioned Act provides substantially as follows :—

Both for original and continuing advance.

Notwithstanding notice of agency.

By the first section, that any agent entrusted with the possession of goods, *or of the documents of title to goods*, shall be *deemed and taken* to be the owner of such goods and documents, so far as to give validity to any contract or agreement by way of pledge, lien or security, *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof, and that such contract or agreement shall be binding upon and good against the owner of such goods, and all persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent.

By section 2 it is enacted that where any such contract or agreement for pledge, lien or security, shall be made in consideration of the delivery or transfer to such agent of any other goods or merchandise or document of title or negotiable security, upon which the person so delivering up the same had at the time a valid and available lien, and security for, or in respect of a previous advance, by virtue of some contract or agreement made with such agent, such contract or agreement, if *bonâ fide* on the part of the person with whom the same may be made, shall be deemed to be a contract made in consideration of an advance, within the true intent and meaning of this Act, and shall be as valid and effectual, to all intents and purposes, and to the same extent as if the consideration for the same had been a *bonâ fide* present advance of money, provided that the lien so acquired shall not exceed in amount the value of whatever may be delivered up or exchanged.

Transactions must be *bonâ fide*.

By section 3 it is provided, “ That this Act, and every matter and thing therein contained, shall be deemed and construed to give validity to such contracts and agreements only, and to protect only such loans, advances and exchanges, as shall be made *bonâ fide*, and without notice that

the agent making such contracts or agreements as aforesaid has not authority to make the same, or is acting *mala fide* in respect thereof against the owner of such goods and merchandise, and nothing herein shall be construed to extend to or protect any lien or pledge for or in respect of any antecedent debt owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorise any agent intrusted as aforesaid, in deviating from any express orders or authority received from the owner, but and for the purport and to the intent of protecting all such *bona fide* loans, advances, and exchanges as aforesaid (though made with notice of such agent not being the owner, but without any notice of the agent acting without authority), and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods.”

Antecedent  
debts.

By section 4, a “document of title” is stated to mean “any bill of lading, India warrant, dock warrant, warehouse-keeper’s certificate, warrant, or order for the delivery of goods, or any other document used in the ordinary course of business as *proof of the possession* or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of such document to transfer or receive goods *thereby represented*.”

The same section defines an “agent” as “intrusted,” whether he has the goods or documents in his actual custody, or they are held by any other person subject to his control, or for him or on his behalf; and provides that, where any loan or advance shall be *bona fide* made to any agent intrusted with and in possession of any such goods or documents of title, on the faith of any contract or agreement in writing, to consign, deposit, transfer, or deliver them, and they shall actually be received by the person making such loan or advance, without notice that such agent was not authorised to make such pledge or security, every such loan or advance shall be deemed and taken to be a loan or advance on the security of such goods or documents of title, though not actually received by the



person making such loan or advance till the period subsequent thereto.

The section further provides that any payment made, whether by money or bills of exchange, or other negotiable security, shall be an advance: and that the agent in possession of such goods or documents shall be taken to have been intrusted with them by the owner, *unless the contrary can be shown in evidence.*

The antecedent Act of 6 Geo. IV. c. 94, provided in the second section, that the possession of these documents of title should suffice "to give validity to any sale or disposition of the goods," by the factor, and the amending Act during the reign of her Majesty was intended to extend the powers of factors, to increase the security of those dealing with them, and to meet decisions in which, by the stringent construction of the courts,<sup>1</sup> cases supposed to be within the former statutes had been excluded. These purposes are stated in the preamble.

9 & 10 Vict. c.  
399.

Legal Quays in  
London.

11 & 12 Vict.  
c. 18.

Sufferance  
Wharves in  
London.

By the 9 & 10 Vict. c. 399, entitled "An Act for the regulation of the legal quays within the port of London," and the 11 & 12 Vict. c. 18, entitled "An Act for the regulation of certain Sufferance Wharves in the Port of London,"<sup>2</sup> regulations are provided for the unloading of ships in the port of London, into warehouses, at the wharves, whenever the owner of the goods fails to make entry at the Custom House within forty-eight hours after due report, and for the preservation of the lien of the shipowner for the freight, and the statutes also provide as follows: "and the said wharfinger, his servants and agents are hereby required, upon due notice in writing in that behalf given by such master, or owner or other person aforesaid, to the said wharfinger, or left for him at his office or counting-house for the time being, to detain such goods in the warehouse of the

<sup>1</sup> The most important of these decisions were *Evans v. Trueman*, 1 Moo. & R. 10; *Taylor v. Kymer*, 8 B. & Ad. 320; *Fletcher v. Heath*, 7 B. & C. 517; *Phillips v. Huth*, 6 M. & W. 572; 9 M. & W. 647; *Bonzi v.*

*Stewart*, 4 M. & G. 295.

<sup>2</sup> These two Acts, although published among the Local Acts, are declared by a clause annexed to each to be Public Acts, that are to be judicially noticed.

said wharfinger, until the freight to which the same shall be subject as aforesaid shall be duly paid, together with the wharfage, rent, and other charges to which the same shall have become subject and liable." (Sec. 4). "Provided always and be it enacted, that no such notice as hereinbefore mentioned to detain any goods for payment of freight shall be available unless the same be given or left as hereinbefore provided, *before the issue by the said wharfinger of the warrant for the delivery of the same goods, or an order given by the importer, proprietor, or consignee, or his agent, to and accepted by the wharfinger for the delivery of the same* : but nothing herein contained shall authorise any wharfinger to deliver or issue any warrant, or accept any order for the delivery of any goods which shall be subject to a lien for freight, and in respect of which such notice in writing as aforesaid to detain the same for freight shall have been given, until the importer, proprietor, or consignee of such goods shall have produced a withdrawal in writing of the order of stoppage for freight from the owner or master of the ship from or out of which such goods shall have been landed, or his broker or agent, and which order of withdrawal the said master or owner is hereby required to give, on payment or tender of the freight to which the goods shall be liable." (Section 5). It will be remarked that in these Acts, the wharfinger's *warrant* for the delivery of the goods is treated as equivalent to an *accepted* delivery order.

The next statute to be referred to in this connection is the Bills of Lading Act, 18 & 19 Vict. c. 111, which, after reciting in the preamble, that "by the custom of merchants, a bill of lading of goods being transferable by indorsement, the property in the goods may thereby pass to the indorsee, but nevertheless all rights in respect of the contract contained in the bill of lading, continue in the original shipper or owner," proceeds to enact by the first section, that "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the goods therein mentioned shall pass, upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all

18 & 19 Vict.  
c. 111.  
Bills of Lading  
Act.

rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself."

The foregoing, together with such similar provisions as are found in the Acts incorporating the several dock companies, being the only statutory law on the subject of delivery by *indicia* of title, these different commercial instruments will now be considered separately.

Bills of lading,  
their nature  
and effect.

Bills of lading by the law merchant are representatives of the property for which they have been given, and the indorsement and delivery of a bill of lading transfers the property from the vendor to the vendee; is a complete legal delivery of the goods; *divests the vendor's lien*; and has now by the statute just quoted the further effect of vesting in the vendee all the vendor's rights of action against the ship, master and owner. But though the vendor's lien is thus divested by reason of the complete delivery of the *indicia* of property, he may, if the goods have not yet reached the actual possession of the buyer, and if no third person has acquired rights by obtaining a transfer of the bill of lading from the buyer, intercept the goods in the event of the buyer's insolvency before payment, by the exercise of the right of stoppage *in transitu*. These principles in relation to the effect of a bill of lading were first conclusively established in the great leading case of *Lickbarrow v. Mason*,<sup>1</sup> on the authority of which very numerous decisions have since been made, and will be found collected in *Smith's Leading Cases*.<sup>1</sup> On this mode of delivery the law is free from doubt.

The law in relation to bills of lading is more fully discussed, *post*, on Stoppage in Transitu.

Delivery  
orders.

In regard to delivery orders there is also little room for controversy, where by these words are meant orders given by the vendor on a bailee who holds possession as agent of the vendor. The decisions which settle that in such cases the delivery is not complete until the bailee attorns to the buyer, and thus becomes the latter's agent as custodian of

<sup>1</sup> 2 T. R. 63; 1 H. Bl. 357; 6 East, 20; 1 Smith's L. C. 699.

the goods, have been reviewed.<sup>1</sup> It was also decided in *Their effect.* *M'Ewan v. Smith*,<sup>2</sup> and *Griffiths v. Perry*,<sup>3</sup> that such a delivery order differed in effect from a bill of lading: that the endorsement of it by a vendee to a sub-vendee was unavailing to oust the possession of the original vendor, and that his lien remained unaffected when neither the first buyer nor the sub-vendee had procured the acceptance of the order, nor taken actual possession of the goods before the order was countermanded.

In treating of the effect of endorsing and delivering dock warrants, and warehouse warrants or certificates, Blackburn, J., remarks,<sup>4</sup> that "these documents are generally written contracts by which the holder of the endorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship, and requiring him to attorn to his rights; but when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is therefore a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore.

Dock warrants and warehouse warrants or certificates. Remarks in Blackburn on Sales.

"Besides this substantial difference between them, there is the more technical one that bills of lading are ancient mercantile documents, which may be subject to the law merchant, whilst the other class of documents are of modern invention, and no custom of merchants relating to them has ever been established." After reviewing the authorities then

<sup>1</sup> Book I. Part 2, Ch. 4, "On Actual Receipt."

<sup>2</sup> 2 H. of L. Ca. 309.

<sup>3</sup> 1 E. & E. 680; 28 L. J., Q. B. 208.

<sup>4</sup> Blackburn on Sales, 297.

extant, the learned author concluded by saying: "It is therefore submitted, that the endorsement of a delivery order or dock warrant *has not* (independently of the Factors' Acts) *any effect beyond that of a token of an authority to receive possession.*"

His views confirmed by subsequent cases.

Farina v. Home.

This view of the law was confirmed, immediately after the publication of the Treatise on Sales, by the Exchequer of Pleas, in *Farina v. Home*.<sup>1</sup> There the defendant had retained in his possession for many months a delivery warrant, signed by a wharfinger, whereby the goods were made deliverable to the plaintiff, *or his assignee by endorsement*, on payment of rent and charges from the 25th July; the document was dated on the 21st July, and forthwith endorsed to the defendant as vendee; but the latter refused to take the goods or return the warrant, saying, that he had sent it to his solicitor, and meant to defend the action, for he had never ordered the goods. Held, that there had been an acceptance, but no actual receipt of the goods; no delivery to the defendants. Park, B., in giving the judgment of the Court, said: "This warrant is no more than an *engagement by the wharfinger* to deliver to the consignee, or any one he may appoint; and the wharfinger holds the goods as the agent of the consignor (*sic*; consignee?), who is the vendor's agent, and his possession is that of the consignee, until an assignment has taken place, and the wharfinger *has attorned*, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and *then only is there a constructive delivery to him*. In the meantime the warrant, and the endorsement of the warrant, is nothing more than an *offer* to hold the goods as the warehouseman of the assignee. The case is the same in principle as that of *Bentall v. Burn*, and others which are stated and well discussed in a recent able work of Mr. Blackburn 'On the Contract of Sale,' pp. 27, 41, and 297, and in Mr. C. Addison's work, p. 70. We all therefore think, that though there was sufficient evidence of the acceptance, there is none of the *receipt*."

<sup>1</sup> 16 M. & W. 119.

This decision has never been overruled, and before proceeding further, it is useful to remark how completely opposed to each other are the interpretations put on these documents by the Courts and the law-givers. In the decided cases between vendor and vendee, the judges construe these documents as mere "tokens of authority to receive possession;" as mere "offers" by the warehouseman to hold the goods for an endorsee of the warrant, inchoate and incomplete, till the vendee has obtained the warehouseman's assent to attorn to him.

Remarks on the opposite construction by courts and law-givers.

The Legislature, on the other hand, bases its enactments on the assumption that "dock warrants, warehouse keeper's certificates, warrants, or orders for the delivery of goods," are "*instruments used in the ordinary course of business as proof of the possession or control of goods*," and as "authorising the *possessor* of such document to transfer goods *thereby represented*" (4th section of Factors' Act); and on the further assumption, that a wharfinger's *warrant* for the delivery of goods is equivalent in effect to an *accepted* delivery order. (Legal Quays Act, and Sufferance Wharves Act.) In a word, the Legislature deals with these documents, in the acts above-referred to, as *symbols* of the goods. It is not matter for surprise that when the *ratio decidendi* of the Courts on the one hand, and the *ratio legis ferendæ* of the Legislature on the other, are so much at variance in regard to the *meaning* of these instruments, that the law should be in an anomalous and unsatisfactory state.

It is perhaps to be regretted that the Courts did not give to these papers originally the same meaning as the law-giver attached to them; a meaning which might have been given without doing violence to their language.

No doubt a warehouseman or wharfinger in possession of goods is the bailee of the owner alone from whom he received them, and cannot be forced to become the bailee of any one else without his own consent. But what is there in the law to prevent this assent from being given *in advance*?<sup>1</sup> or to

<sup>1</sup> See the cases of *Salter v. Wool-lams* and *Wood v. Manley*, cited *ante*, p. 503, in the former of which cases Tindal, C. J., said that Jackson

prohibit the bailee from giving *authority* to the owner of the goods to assent in the bailee's behalf to a change in the bailment? If a warehouseman give a written paper to the owner, saying, "I hold ten hogsheads of sugar belonging to you. I authorise you to assent in my behalf that I will be the bailee of any one else to whom you may sell these goods, and your endorsement on this paper shall be accepted by me as full proof that you have given this assent for me, and shall be taken as my assent;" it is submitted that there is no principle of law which would prevent this paper from taking effect according to its import. But, in truth, special juries of London merchants have repeatedly volunteered statements that this is what they understand the paper to mean: that it is not a mere *offer* or *token of authority to receive possession*, but is meant by the parties to be an actual transfer of the possession. In *Lucas v. Dorrien* (7 Taunt. 278), Dallas, C. J., said, in relation to a West India Dock warrant, "I have been several times stopped by a special jury, they being satisfied that the goods pass from hand to hand by the endorsement of these instruments. All special juries cry out with one voice that the practice is that the produce lodged in the docks is transferred by endorsing over the certificates and dock warrants." And at *Nisi Prius*, it was directly decided by Parke, J., in one case,<sup>1</sup> and by Dallas, C. J., in another,<sup>2</sup> that such was the true construction of these mercantile "documents of title."

But the law is now settled in opposition to this construction, for the cases above referred to and others were all before the Court when *Farina v. Home* was decided, and were reviewed by the learned author of the *Treatise on Sales*, when he reached the conclusion above quoted. The reader's attention must therefore be directed to the subsequent decisions, and to the anomalous results that follow from them; results for which the judges, in the recent case

had, in advance, "attorned to the sale." 265.

<sup>2</sup> *Keyser v. Suze, Gow*, 58.

<sup>1</sup> *Zwinger v. Samuda*, 7 Taunt.

of *Fuentes v. Montis*,<sup>1</sup> declared there was now no remedy, save further legislation.

By the decisions under the Factors' Acts already referred to,<sup>2</sup> it is now settled that the words "an agent entrusted with goods or documents of title" do not include a vendee, because he holds in *his own right*, and not as agent.<sup>3</sup> The singular anomaly thus exists, that if a merchant, buying goods and paying the price, receives a transfer of the dock warrant, he will be safe if his vendor is *not owner*, but only agent of the assignor of the warrant, and will not be safe if the vendor *is owner*, because the price may remain unpaid to the assignor of the warrant; and this is the necessary result of the conflicting interpretations put on the dock warrant by the Legislature and the Courts. The original owner is held by the statute to have abandoned his *actual possession* by giving the document of title to his agent, although he retains *ownership and right of possession*: he is held by the Courts to have retained his *actual possession* when he gives the document to a purchaser, although he has abandoned *both ownership and right of possession*.

Vendee not included in the terms of the Factors' Act.

The safety of the man who buys goods from a *factor* is not affected by the fact that the document of title only came into the factor's hands in consequence of his false and fraudulent representations to the owner, if it appear that the owner really *entrusted* the factor or his agent with the document:<sup>4</sup> but if a person gets possession of a document of title by fraud, without having been *entrusted* with it *as agent of the owner*, or as vendee, he has no title at all, either as principal or agent, and can convey none to anybody else.<sup>5</sup> This was really the point decided by the Exchequer Chamber in *Kingsford v. Merry*,<sup>5</sup> a case which created some excitement among the city merchants, who did not at first understand its true import.

Factors' transfer of document of title valid in favour of bona fide purchaser, although obtained by fraud.

*Kingsford v. Merry*.

<sup>1</sup> L. R. 3 C. P. 268; 37 L. J., C. P.

<sup>2</sup> *Ante*, pp. 13—15.

<sup>3</sup> *Jenkyns v. Osborne*, 7 M. & G. 678; *Van Casteel v. Booker*, 2 Ex. 691; *Fuentes v. Montis*, *supra*.

<sup>4</sup> *Sheppard v. The Union Bank of*

London, 7 H. & N. 661; 31 L. J., Ex. 154; *Baines v. Swainson*, 4 B. & S. 270; 32 L. J., Q. B. 281.

<sup>5</sup> *Kingsford v. Merry*, 11 Ex. 577; 25 L. J., Ex. 166; and in *Cam. Socacc.* 1 H. & N. 503; 26 L. J., Ex. 83.



Baines v.  
Swainson.

In *Baines v. Swainson*,<sup>1</sup> Blackburn, J., first pointed attention to the clause at the end of the 4th section of the Factors' Act, "unless the contrary can be shown in evidence," and attributed to it the effect of enabling the owner to set aside a sale, if he could succeed in disproving the ostensible entrusting.

Fuentes v.  
Montis.

This view was deliberately adopted by Willes, J., in delivering the opinion in *Fuentes v. Montis*,<sup>2</sup> which decides the very important point, that a secret revocation of the agent's power will defeat the rights of *bond fide* pledgees, (and it would *seem* of purchasers,) although the goods remained in the hands of the agent. The language of the learned judge is as follows:—

"In the case of an agent for sale, whose general business it is to sell, intrusted for a purpose other than sale, as, for instance, if he were intrusted upon an advance against the goods, but with directions not to sell, being a mere lender, and upon his pledge of them; or, if he happen to have a warehouse, though his general business was that of a factor, and not that of a warehouseman, and on the particular occasion the goods were put in his warehouse at a rent, in both cases he would be a person who, *primâ facie*, would be justified in dealing with goods under the Factors' Act; and yet there is an express provision with respect to such a person—because one cannot doubt that the judges in the case of *Baines v. Swainson* were right in so expounding the section—there is an express provision, as it appeared to them, and as it appears to me, that with respect to such a person, he should only be *primâ facie* in the situation of being able to deal with the principal's goods more generally than the principal had authorised him; that the principal, on proving the true nature of the transaction between them, should be able to rebut the presumption of his enlarged authority under the Factors' Acts, and should be entitled to call for a better account from a third person dealing with his goods without his authority, than that they were obtained from an

<sup>1</sup> 4 B. & S. 270; 32 L. J., Q. B. 281. <sup>2</sup> L. R. 3, C. P. 268; 37 L. J., C. P.

*agent, and that the Factors' Act applied.* That provision is the last in the 4th section of 5 & 6 Vict. c. 39: 'An agent in possession as aforesaid of such goods or documents shall be taken for the purposes of this Act to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.' I believe that that provision in the 4th section has been applied to that extent in the judgment of my brother Blackburn in the case in 4 B. & S. 285, where he expressed an opinion that it was sufficient for the person making the advance upon the goods to show that the agent who was in apparent possession of them was an agent whose general business was one that would bring him within the operation of the Factors' Act, and thereby to *throw upon the principal the burthen of proving that in the particular transaction, with respect to the goods in question, the agent was not such agent.* I should, therefore, but for that statement, have been rather disposed to read that last clause (the 4th section) as applicable to the cases expressly provided for in the previous Act, and say that by this Act a factor or agent is held to become intrusted with the possession of documents which he has been enabled to obtain by reason of having been intrusted with the possession of other documents which led to the former being obtained, entirely, as it were, as a key to them. But I will not criticise the judgment of my brother Blackburn, and the other judges in that case, but adopt it for the purpose of the present. Here is a case in which an agent whose general business has been within the Act, being in possession of goods, is supposed to have pledged them. What is the result? Is it that the person who dealt with such agent is by reason of his general employment, and by reason of his having been a *bonâ fide* agent, the principal being innocent of the transaction, to take advantage of the apparent ownership of the agent in a sale in market overt, or be entitled to take advantage of the sale, or is it open to after claim or proof, if the principal can make out that there was no real intrusting within the meaning of the Act? Let the Act speak for itself. 'An agent in possession as aforesaid of such goods

or documents shall be taken, for the purposes of this Act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence.' The inevitable conclusion is, that if the contrary be shown in evidence, 'an agent in possession as aforesaid of such goods or documents' is not to be taken to have been 'intrusted therewith by the owner thereof.' I draw my conclusions from that state of the law of which I have endeavoured to give a summary, not dwelling upon the precise language of the Act for the present, but dwelling upon the construction which has been put upon the Acts with a view to see whether that construction comes, in reality, to a decision of this case. The conclusion to which the course of decisions compels me to arrive is that expressed by Blackburn, J., in the case in 4 B. & S., namely, *that the authority given by the Factors' Acts, quoad third persons, is an authority superadded and accessory to the ordinary authority given by a principal to his factor; or to such authority given by the principal to his agent as would fall within the provisions of the Factors' Acts.* It is not intended by these Acts of Parliament to provide a remedy for those hardships which have accrued to innocent persons by dealing with people in the apparent ownership of goods as if they were the real owners; but the intention of the Legislature was only to deal with cases in which *innocent persons had been taken in in such dealings by the agents of the owners of the goods—the agents 'intrusted and in possession.'* Much argument was bestowed, and properly, upon those words, 'intrusted and in possession;' but it appears to me that before you can deal with either the state of being 'intrusted,' or the state of being 'in possession,' you must first get hold of your substantive, namely, 'agent'—the person who is to give the title as against the principal must be an agent, and if he is not an agent he is not a person to whom the provisions of the Act apply."

The recent cases in which this question has been referred to, independently of the Factors' Acts, will now be presented.

It was held, in *Bartlett v. Holmes*,<sup>1</sup> that a delivery order by which a warehouseman acknowledged to hold goods deliverable to A., "on the *presentation* of this document duly endorsed by you," did not authorise the endorsee to claim the goods by merely *showing* the order, but that he must deliver it up to the warehouseman *before* the latter could be required to part with the goods. The reasoning of the Court in this case would seem to cover all "documents of title." The grounds given by Jervis, C. J., and concurred in by Williams and Cresswell, JJ., were two. 1st. That confidence must be placed by one of the parties in the other, where the article is bulky, and the exchange of the goods for the document cannot possibly be simultaneous. 2ndly. That if the party having the goods were to make the delivery before receiving the document, he would *expose himself to the risk of the document's being transferred to third persons by a second sale*.

Warehouseman may demand surrender of his warrant, promising to deliver goods "on presentation" *before giving the goods.*  
*Bartlett v. Holmes.*

In *Johnson v. Stear*,<sup>2</sup> the action was trover by the assignee of one Cumming, who had pledged goods to the defendant by delivering him the dock warrant, with authority to sell the goods, if the loan for which they were pledged was not repaid on the 29th January. In the middle of January, Cumming became bankrupt, and the defendant, Stear, sold the goods on the 28th, and handed over the dock warrant to the vendee on the 29th, and the latter took the goods on the 30th. The Court held this a conversion by Stear, the defendant; Erle, C. J., saying, that "by delivering over the dock warrant to the vendee \* \* \* he interfered with the right which Cumming had, of taking possession on the 29th if he repaid the loan, for which purpose the dock warrant would have been an important instrument." Williams, J., said: "The handing over of the dock warrant to the vendee, before the time had arrived at which the brandies could be properly sold, according to the terms on which they were pledged, constituted a conversion, inasmuch as it was *tantamount to a delivery*. Not that the

*Johnson v. Stear.*

<sup>1</sup> 13 C. B. 630; 22 L. J., C. P. 182.

<sup>2</sup> 15 C. B., N. S. 330; 33 L. J., C. P. 130.

*warrant is to be considered in the light of a symbol, but because, according to the doctrines applied in donations mortis causa, it is the means of coming into possession of a thing, which will not admit of corporal delivery."*

Bill of lading  
represents  
goods *after*  
being landed at  
London wharves  
until replaced  
by wharfinger's  
warrant.  
Meyerstein v.  
Barber.

In the Exchequer Chamber,<sup>1</sup> the case of Meyerstein v. Barber was decided in 1867, and the point determined excited great interest in the City. The consignee of certain cotton, which arrived on the 31st January, 1865, entered it at the Custom House, to be landed at a sufferance wharf, with a stop for freight, under the Sufferance Wharves Act;<sup>2</sup> and the cotton was so landed. On the 4th March, the consignee obtained an advance from the plaintiff on the pledge of the bills of lading, but gave up only two of the bills; the plaintiff, who did not know that the vessel had arrived, believing that the third was in the captain's hands. The consignee fraudulently pledged the third bill on the 6th of March to the defendant for advances, and on that day the stop for freight was removed; and the defendant obtained the wharfinger's warrant, and sold the cotton, and received the proceeds. The action was for money had and received, and in trover. It was contended on behalf of the defendants, that goods are not represented by bills of lading after they have been landed, and the master has performed his contract; that the bill of lading ceases to be negotiable after this is done: and upon this contention the case turned. The judges however held unanimously that *the bills of lading continued to represent the goods at the sufferance wharf, until replaced by the wharfinger's warrant*; and that the plaintiff was therefore entitled to maintain his verdict. Martin, B., in delivering the judgment of the Court, said: "For many years past there have been *two symbols of property* in goods imported; the one the bill of lading, the other the wharfinger's certificate or warrant. *Until the latter is issued by the wharfinger, the former remains the only symbol of property in the goods.*" These dicta, however, which would seem, at least so far as the London quays and Sufferance wharves are concerned, to

<sup>1</sup> L. R. 2, C. P. 661; 36 L. J., C. P. 361.

<sup>2</sup> *Ante*, p. 610.

be in opposition to the ruling in *Farina v. Home*, in relation to the effect of documents of title, must be taken in connection with the fact, that Blackburn, J., who was a member of the Court, is reported to have said, when the passage from the Treatise on Sales,<sup>1</sup> above quoted (p. 618), was cited in argument: "That was published twenty-two years ago, and I have not changed my opinion."

It is therefore concluded, that by the law as now settled, the endorsement and transfer of a dock warrant, warehouse certificate, or other like document of title, by a vendor to a vendee, *is not such a delivery of possession as divests the vendor's lien.*

Whether this result would be affected by proof of *usage in the particular trade*, that the delivery of such documents is intended by both parties to constitute a delivery of *actual possession*, is a point that does not seem to have arisen since the decision in *Farina v. Home*, and may perhaps be deemed still an open question.

The vendor's lien is not lost by sending goods on board of a vessel in accordance with the buyer's instructions, even though by the contract the goods are to be delivered free on board to the buyer, if the vendor on delivering the goods takes<sup>2</sup> or demands<sup>3</sup> a receipt for them in his own name, for this is evidence that he has not yet parted with his control; the possession of the receipt entitles him to the bill of lading; and the goods, represented by their symbol the bill of lading, are still in his possession, which can only be divested by his parting with the bill of lading. But if the vessel belonged to the purchaser, the delivery would be complete under such circumstances, and the lien lost.<sup>4</sup>

When goods have been sold on credit, and the purchaser permits them to remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent. The point

Endorsement and delivery of dock warrants and other like documents of title by vendor to vendee does not divest lien.

Quære, whether proof of usage to the contrary would avail.

Vendor's lien not lost by delivering goods f. o. b. on a vessel if he take receipt in his own name.

Unless the vessel belonged to the purchaser.

Lien revives in case of goods sold on credit, if possession remains in vendor at expiration of credit.

<sup>1</sup> Blackburn on Sales, pp. 297—8. 632.

<sup>2</sup> Craven v. Ryder, 6 Taunt. 433.

<sup>3</sup> Ruck v. Hatfield, 5 B. & Ald. 405.

<sup>4</sup> Cowasjee v. Thompson, 5 Moore, P. C. C. 165.

was directly decided at *Nisi Prius* by Bayley, J., in *New v. Swain*,<sup>1</sup> and by Littledale, J., in *Bunney v. Poyntz*,<sup>2</sup> and has ever since been treated as settled law, though there has been no case decided in Banc. Among the numerous *dicta* where the law is assumed to be undoubted on this point, are those of Lord Campbell, *ante*, p. 578; Parke, B., in *Dixon v. Yates*; <sup>3</sup> of the Court, in *Martindale v. Smith*; <sup>4</sup> of the Barons of the Exchequer, in *Castle v. Sworder*,<sup>5</sup> and in *Miles v. Gorton*; <sup>6</sup> and of the Judges of the Queen's Bench, in *Valpy v. Oakeley*.<sup>7</sup>

Tender of price  
divests lien.

As the vendor's lien is a right granted to him by law solely for the purpose of enabling him to obtain payment of the price, it follows, that a tender of the price puts an end to the lien, even if the vendor decline to receive the money; and this was the decision in *Martindale v. Smith*.<sup>8</sup>

Loss of lien  
where goods  
are lying on  
premises of a  
third person  
not bailee of  
vendor.

Where the vendor allows the purchaser to mark, or spend money upon the goods sold, which are lying at a public wharf, or on the premises of a third person, *not the bailee of the vendor*, and to take away part of the goods, this is so complete a delivery of possession as to divest the lien, although the vendor might, under the same circumstances, have had the right to retain the goods, if they had been on his own premises.<sup>9</sup>

<sup>1</sup> 1 *Dans. & L.* 193.

<sup>2</sup> 4 *B. & Ad.* 568.

<sup>3</sup> 5 *B. & Ad.* at p. 341.

<sup>4</sup> 1 *Q. B.* at p. 395.

<sup>5</sup> 5 *H. & N.* 281; 29 *L. J., Ex.* 235.

<sup>6</sup> 2 *C. & M.* at p. 510.

<sup>7</sup> 16 *Q. B.* 941; 20 *L. J., Q. B.* 380.

<sup>8</sup> 1 *Q. B.* 389.

<sup>9</sup> *Tansley v. Turner*, 2 *Bing. N. C.* 151; *Cooper v. Bill*, 3 *H. & C.* 722; 34 *L. J., Ex.* 161.

## CHAPTER V.

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agent till after the transit had		buyer expressly for the goods	
ended . . . . .	630	or not . . . . .	637
Vendor's right not impaired by		When a vessel chartered by the	
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Nor by conditional payment . .	631	own vessel . . . . .	637
But the right is gone if he has		Before bill of lading taken ven-	
received securities in absolute		dor reserves his lien by taking	
payment . . . . .	631	ship's receipts for the goods in	
Consignor may stop goods al-		his own name, so as to entitle	
though an account current is		himself to the bill of lading .	639
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the balance is uncertain . . .	631	purchaser's own vessel, and	
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—Quære ? . . . . .	631	lying in a warehouse if at an	



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THE last remedy which an unpaid vendor has against the goods, is stoppage *in transitu*. This is a right which arises solely upon the *insolvency* of the buyer, and is based on the plain reason of justice and equity that one man's goods shall not be applied to the payment of another man's debts.<sup>1</sup> If, therefore, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer,—(which, as we have seen in the preceding chapter is such a constructive delivery as divests the vendor's lien),—he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people.

This right exists only when buyer is insolvent.

The history of the law of stoppage *in transitu* is given very fully by Lord Abinger, in *Gibson v. Caruthers*,<sup>2</sup> to which the reader is referred. It now prevails almost universally among commercial nations, and may best be considered by dividing the inquiry into the following sections :

History given by Lord Abinger.

1. Who may exercise the right?
2. Against whom may it be exercised?
3. When does the transit begin? when does it end?
4. How is the vendor to exercise the right?
5. How may the right be defeated when the goods are represented by a bill of lading?

#### SECTION I.—WHO MAY EXERCISE THE RIGHT?

Stoppage *in transitu* is so highly favoured, on account of its intrinsic justice, that it has been extended by the courts to quasi-vendors: to persons in a position similar to that of vendors.

Persons in position similar to vendors, as consignors, &c., may stop.

In *Feise v. Wray*,<sup>3</sup> Lord Ellenborough and the other judges of the King's Bench held the right to exist in favour of a consignor who had bought goods, on account and by order of his principal, on the factor's own credit, in a foreign port, and had shipped the goods to London, drawing bills

Consignor who has bought with his own money or credit.

<sup>1</sup> *Per* Lord Northington, C., in *D'Aquila v. Lambert*, 2 Eden, 77.

<sup>2</sup> 8 M. & W. 337.

<sup>3</sup> 3 East, 93.

on the merchant here, who had ordered the goods and become bankrupt during the transit. The bankrupt's assignee contended that the factor was but an *agent* with a lien, but the Court held that he might be considered as a vendor who had first bought the goods, and then sold them to his correspondent at cost, plus his commission. The principle of this case has been recognised in numerous subsequent decisions.<sup>1</sup>

Agent of vendor to whom the latter has endorsed the bill of lading may stop in his own name.

The transfer of the bill of lading by the vendor to his agent, vests a sufficient special property in the latter to entitle him stop *in transitu* in his own name. This was held to be the law, even before the Bills of Lading Act.<sup>2</sup>

Vendor of an interest in an executory contract may stop the goods.

The vendor of an interest in an executory agreement may also stop the goods, as if he were owner of them. In *Jenkyns v. Osborne*,<sup>3</sup> the plaintiff was agent of a foreign house, which had shipped a cargo of beans to London; a portion of the cargo had been ordered by Hunter and Co., of London, but only one bill of lading had been taken for the whole cargo, and this was given to Hunter and Co., they giving to the plaintiff a letter, acknowledging that 1442 sacks of the beans were his property, together with a delivery order, addressed to the master of the vessel, requesting him to deliver to bearer 1442 sacks, out of the cargo on board. Before the arrival of the vessel, plaintiff sold these 1442 sacks, on credit, to one Thomas, giving him the letter and delivery order of Hunter and Co. Thomas obtained an advance from the defendant on this delivery order and letter, together with other securities. Thomas stopped payment before the arrival of the vessel, and before paying for the goods, and the plaintiff gave notice to the master, on the arrival of the goods, not to deliver them. Held, that although at the time of the stoppage the property in the 1442 sacks had not vested in the plaintiff, but only the right to take them after being separated

*Jenkyns v. Osborne.*

<sup>1</sup> *The Tigress*, 32 L. J., Adm. 97; *Company*, 6 Ex. 543, 20 L. J., Ex. 393; *Patten v. Thompson*, 5 M. & S. 350; *Ellershaw v. Magniac*, 6 Ex. 570; *Ogle v. Atkinson*, 5 Taunt. 759; *Oakford v. Drake*, 2 F. & F. 493;

*Tucker v. Humphrey*, 4 Bing. 516; *Turner v. Trustees Liverpool Dock*

<sup>2</sup> *Morison v. Gray*, 2 Bing. 260.

<sup>3</sup> 7 M. & G. 678; 8 Scott, N. R. 505.

from the portion of the cargo belonging to Hunter and Co., yet the interest of the plaintiff in the goods was sufficient to entitle him to exercise the vendor's rights of stoppage.

It was said by Lord Ellenborough, in *Siffkin v. Wray*,<sup>1</sup> that a mere surety for the buyer had no right to stop *in transitu*: but if a surety for an insolvent buyer should pay the vendor, it would seem that he would now have the right of stoppage *in transitu*, if not in his own name, at all events in the name of the vendor, by virtue of the provisions of the 5th section of the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), which provides that "every person, who being surety for the debt or duty of another, or being liable with another for any debt or duty shall pay such debt or perform such duty, shall be entitled to have assigned to him or to a trustee for him every judgment, specialty or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and *such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and if need be, and upon a proper indemnity to use the name of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, &c.*" : but no case has yet been presented for decision on this point.<sup>2</sup>

May surety  
exercise the  
right?

The right of stoppage *in transitu* does not depend on the fact that the vendor having had a lien and parted with it, may get it back again if he can stop the goods in transit, but is a right arising out of his relation to the goods *quà* vendor, which is greater than a lien. Other persons, there-

Parties having  
other liens than  
that of vendor  
cannot stop.

<sup>1</sup> 6 East, 371.

<sup>2</sup> The only decisions met with as to the construction of this section, are *Lockhart v. Reilly*, 1 De G. & J. 464,

27 L. J., Ch. 54; *Batchelor v. Lawrence*, 9 C. B., N. S. 543, 30 L. J., C. P. 39; and *Brandon v. Brandon*, 28 L. J., Ch. 150.

fore, entitled to liens, as factors,<sup>1</sup> fullers<sup>2</sup> who have fulled cloths, have no right to stop *in transitu*, before obtaining or after having lost possession.

Consignor may stop even if his factor have made advances or have a joint interest in the goods.  
Agent of vendor.

A principal consigning goods to a factor has the right of stoppage *in transitu*, on the latter becoming insolvent, even if the factor have made advances on the faith of the consignment,<sup>3</sup> or have a joint interest with the consignor.<sup>4</sup>

An agent of the vendor may make a stoppage in behalf of his principal,<sup>5</sup> but attempts have been made occasionally by persons who had no authority, and whose acts were subsequently ratified, and the cases establish certain distinctions.

Ratification after stoppage where party has never had any agency for vendor.  
Bird v. Brown.

Where the stoppage *in transitu* is effected in behalf of the vendor, by one who has at no time had any authority to act for him, a subsequent ratification of the vendor will be too late if made after the transit is ended. In *Bird v. Brown*,<sup>6</sup> the holder of some bills of exchange, drawn by the vendor on the purchaser, for the price of the goods, assumed to act in behalf of the vendor in stopping the goods *in transitu*, and the assignees of the bankrupt buyer also demanded the goods. After this demand by the assignees, the vendor adopted and ratified the stoppage made in his behalf by the holder of the bills of exchange, but the Court held that the property in the goods had vested in the assignees, by their demand of delivery, and this ownership could not be altered retrospectively by the vendor's subsequent ratification.

Ratification where a letter giving authority had not reached agent when he assumed to act.  
Hutchings v. Nunes.

But in *Hutchings v. Nunes*,<sup>7</sup> the stoppage was made by the defendant, who had previously done business for the vendor as his agent. The defendant had written to the vendor, informing him of the insolvency of the buyer, on the 26th March, and the vendor on the 16th April enclosed to the defendant a power of attorney to act for him. The defendant, before receiving this power, to wit, on the 21st

<sup>1</sup> *Kinloch v. Craig*, 3 T. R. 119; and in Dom. Proc. *ib.* 786, and 4 Brown's P. C. 47.

<sup>2</sup> *Sweet v. Pym*, 1 East, 4.

<sup>3</sup> *Kinloch v. Craig*, 3 T. R. 119.

<sup>4</sup> *Newsom v. Thornton*, 6 East, 17.

<sup>5</sup> *Whitehead v. Anderson*, 9 M. & W. 518.

<sup>6</sup> 4 Ex. 786.

<sup>7</sup> 1 Moore, P. C., N. S. 243.

April, assumed to act for the vendor, and effected the stoppage. Held, by the Privy Council, distinguishing this case from *Bird v. Brown*, that the power actually despatched on the 16th April was a sufficient ratification of the agent's act done on the 21st, although the agent was not then aware of the existence of the authority.

The vendor's right exists, notwithstanding partial payment of the price;<sup>1</sup> and it is not lost by his having received conditional payment by bills of exchange or other securities,<sup>2</sup> even though he may have negotiated the bills so that they are outstanding in third hands, unmatured.<sup>3</sup>

Vendor's right not affected by partial payment.

Nor by conditional payment.

It has already been shown, however,<sup>4</sup> that a vendor is not unpaid, if he have taken bills or securities in *absolute* payment. He must in such cases seek his remedy on the securities, having no further right on the goods.

But vendor who has received securities in absolute payment cannot stop in transitu.

In *Wood v. Jones*,<sup>5</sup> it was held that the consignor, whose bill drawn against a cargo had been dishonoured by an insolvent consignee, was not deprived of the right of stoppage because he had in his own hands goods belonging to his consignee unaccounted for, and the account current between them had not been adjusted, and the balance was uncertain.

Consignor may stop in transitu although the account current with his consignee is unadjusted and balance uncertain.

But in *Vertue v. Jewell*,<sup>6</sup> it was held by Lord Ellenborough, and confirmed by the Court in Banc, that a consignor who was indebted to the consignee on a balance of accounts, in which were included acceptances of the consignee outstanding and unmatured, and who, under these circumstances, shipped a parcel of barley on account of that balance, had no right of stoppage on the insolvency of the consignee, although the acceptances were afterwards dishonoured. Lord Ellenborough said, that "the circumstance of Bloom (the consignor) being indebted to them on the balance of accounts, divested him of all control over

*Wood v. Jones.*

A consignor who ships goods in payment of immatured acceptances cannot stop in transitu on learning the insolvency of the acceptor — *quære?*

*Vertue v. Jewell.*

<sup>1</sup> *Hodgson v. Loy*, 7 T. R. 440; *Feise v. Wray*, 3 East, 93; *Edwards v. Brewer*, 2 M. & W. 375; *Van Casteel v. Booker*, 2 Ex. 702.

<sup>2</sup> *Dixon v. Yates*, 5 B. & Ad. 345; *Feise v. Wray*, *supra*; *Edwards v. Brewer*, *supra*.

<sup>3</sup> *Feise v. Wray*, *supra*; *Patten v. Thompson*, 5 M. & S. 350; *Edwards v. Brewer*, 2 M. & W. 375; *Miles v. Gorton*, 2 Cr. & M. 504.

<sup>4</sup> *Ante*, p. 541.

<sup>5</sup> 7 D. & R. 126.

<sup>6</sup> 4 Camp. 31.

the barley from the moment of the shipment. The non-payment of the bills of exchange cannot be taken into consideration." The Court held, in *Banc*, that under these circumstances the consignees were to be considered as purchasers for a valuable consideration.

*Vertue v. Jewell* questioned.

This case has never been overruled, but, if correctly reported, is very questionable law. Blackburn, J., in the *Treatise on Sales* (p. 220), suggests as an explanation, that the position of the consignor was not such as to allow him to be considered as a vendor, and that the case would therefore be an authority for the proposition that the right of stoppage is peculiar to a vendor. But it happens, unfortunately for this explanation, that the report states in express terms that the ground of the decision in *Banc* was, that the consignees "were to be considered the purchasers of the goods for a valuable consideration;" a ground which would prove the right of stoppage to *exist*; for it had already been held by the same Court, in *Feise v. Wray*,<sup>1</sup> that a vendor's right of stoppage was not taken away by the fact that he had received acceptances for the price of the goods, which were outstanding and unmatured at the time of the stoppage.

When this case was pressed on the Court by the counsel in *Patten v. Thompson*,<sup>2</sup> Lord Ellenborough did not suggest that it was good law *as reported*, but said: "*I have looked also into that case of Vertue v. Jewell, and find that there the bill of lading was endorsed and sent by the consignor on account of a balance due from him, including several acceptances then running; so that it was the case of a pledge to cover these acceptances.*" There was an interval of only two years between the cases, and this explanation scarcely renders *Vertue v. Jewell* more intelligible: for it was recognised as settled law in *Patten v. Thompson*, that a consignor may stop the *specific* goods on which his consignee has made advances, on learning the consignee's insolvency;<sup>3</sup>

<sup>1</sup> 3 East, 93.

<sup>2</sup> 5 M. & S. 350.

<sup>3</sup> This had been settled in *Kinloch*

*v. Craig*, in *Dom. Proc.* (*ante*, p. 630),  
3 T. R. 786.

and it is very hard to understand how a consignor's right of stoppage can be greater against the very goods on the faith of which an advance has been made to him, than against goods on which the consignee has made no special advance, but which are sent to him to meet unmatured acceptances given in general account; or why the latter is a pledge, and not the former.

The unpaid vendor's right of stoppage is higher in its nature than a carrier's lien for a *general balance*,<sup>1</sup> though not for the special charges on the goods sold; and he may also maintain his claim as paramount to that of a creditor of the buyer who has attached the goods while in transit, by process out of the Mayor's Court of the City of London.<sup>2</sup>

Vendor's right of stoppage paramount to general lien of carrier,

and to attaching creditor's.

#### SECTION II.—AGAINST WHOM MAY IT BE EXERCISED?

The vendor can only exercise this right against an *insolvent* or *bankrupt* buyer. By the word "insolvency" is meant a general inability to pay one's debts;<sup>3</sup> and of this inability, the failure to pay one just and admitted debt would probably be sufficient.<sup>4</sup> And in a number of the cases, the fact that the buyer or consignee had "stopped payment" has been considered, as a matter of course, to be such an insolvency as justified stoppage *in transitu*.<sup>5</sup>

Only against bankrupt or insolvent vendee.

What is insolvency.

If the vendor stop *in transitu* where the vendee has not yet become insolvent, he does so at his peril. If on the arrival of the goods at destination, the vendee is then insolvent, the premature stoppage will avail for the protection of the vendor; but if the vendee remain solvent, the vendor would be bound to deliver the goods, with an indemnification for expenses incurred.<sup>6</sup>

Vendor stops at his peril in advance of buyer's insolvency.

<sup>1</sup> *Oppenheim v. Russell*, 3 B. & P. 42.

<sup>2</sup> *Smith v. Goss*, 1 Camp. 282.

<sup>3</sup> *Parker v. Gossage*, 2 C. M. & R. 617; *Biddlecombe v. Bond*, 4 Ad. & E. 332.

<sup>4</sup> *Smith's Merc. Law*, note, p. 549.

<sup>5</sup> *Vertue v. Jewell*, 4 Camp. 31; *Newsom v. Thornton*, 6 East, 17; *Dixon v. Yates*, 5 B. & Ad. 313; *Bird v. Brown*, 4 Exch. 786.

<sup>6</sup> *Per Lord Stowell*, in *The Constantia*, 6 Rob. Ad. R. 321.



In "The Tigress,"<sup>1</sup> Dr. Lushington, in delivering judgment, said: "Whether the vendee is insolvent may not transpire till afterwards (*i.e.* after the stoppage), when the bill of exchange for the goods becomes due; for it is, as I conceive, clear law that the right to stop does not require the vendee to have been found insolvent." But this was a case between the vendor and the owners of the vessel, not between vendor and vendee, and will be more fully referred to *post*.

### SECTION III.—WHEN DOES THE TRANSIT BEGIN :

#### AND END ?

How long the transit continues.

The transit is held to continue from the time the vendor parts with the possession, until the purchaser acquires it; that is to say, from the time when the vendor has so far made delivery, that his right of retaining the goods, and his right of lien, as described in the antecedent chapters, are gone, to the time when the goods have reached the *actual* possession of the buyer.

The right comes into existence after vendor has parted with title and right of possession and actual possession.

And here the reader must be reminded that the vendor's right in the goods is very frequently not ended on their arrival at their ultimate destination, because of his having retained *the property* in them. The mode by which the vendor may guard himself against the buyer's insolvency through the reservation of the *jus disponendi*, of the *title* to the goods, has been treated, *ante*, Book II., Ch. 6. The stoppage *in transitu* is called into existence for the vendor's benefit, after the buyer has acquired *title*, and *right of possession*, and *even constructive possession*, but not yet *actual possession*.

General principles as stated by Parke, B. *James v. Griffin*.

In *James v. Griffin*,<sup>2</sup> which was twice before the Exchequer of Pleas, Parke, B., in giving his opinion on the second occasion, thus stated the general principles: "Of the law on this subject to a certain extent, and sufficient for the decision of this case, there is no doubt. The

<sup>1</sup> 32 L. J., Adm. 97.

<sup>2</sup> 1 M. & W. 20; 2 M. & W. 633.

delivery by the vendor of goods sold, to a carrier of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods,—before they are actually delivered to the vendee, or some one whom he means to be *his agent to take possession of and keep the goods for him*,—and thereby to *replace the vendor* in the same situation, as if he had not parted with the actual possession.

\* \* \* The actual delivery to the vendee or his agent, which puts an end to the *transitus*, or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods; *Scott v. Petit* (3 B. & B. 469), *Rowe v. Pickford* (8 Taunt. 83); or at a place where he means the goods to remain, until a fresh destination is communicated to them by orders from himself; *Dixon v. Baldwin* (5 East. 175); or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination."

It is obvious from this clear statement of the law, that each case must be determined according to its own circumstances, the inquiry being whether at the time of the stoppage the transit of the goods had or had not determined. An attempt will be made to classify the cases, so as to afford examples of the controversies most frequently arising in the business of merchants.

Goods are liable to stoppage as long as they remain in possession of the carrier, *quà carrier*,<sup>1</sup> (a qualification to be kept in view, for as we shall presently see, he may become bailee; for [the buyer, as warehouseman or wharfinger, after his duties as carrier have been discharged), and it makes no difference that the carrier has been named or appointed by the vendee.<sup>2</sup>

Goods may be stopped in hands of carrier,

even though named by purchaser.

<sup>1</sup> *Mills v. Ball*, 2 B. & P. 457; Stoppage, *passim*.

*James v. Griffin*, 2 M. & W. 633; *Lickbarrow v. Mason*, 1 Sm. L. C. 699, and notes, and the cases on

<sup>2</sup> *Holst v. Pownall*, 1 Esp. 240; *Northey v. Field*, 2 Esp. 613; *Hodgson v. Loy*, 7 T. R. 440; *Jackson v.*

Goods in passage on the buyer's own cart or vessel are not in transitu.

Vendor may restrain the effect of delivery on the buyer's vessel by the bill of lading.

Schotsman v. Lancashire and Yorkshire Railway Company.

But when the owner sends his own servant for the goods, the delivery to the servant is a delivery into the actual possession of the master. If, therefore, the buyer send his own cart, or his own vessel for the goods, they have reached the buyer's *actual possession*, as soon as the vendor has delivered them into the cart or vessel.<sup>1</sup>

But if the vendor desire to restrain the effect of a delivery of goods on board the vendee's own vessel, he may do so, by taking bills of lading so expressed as to indicate that the delivery is to the master of the vessel as an *agent for carriage*, not an *agent to receive possession for the purchaser*. This point was decided in *Turner v. Liverpool Docks Trustees*,<sup>1</sup> the facts of which are fully reported, *ante*, p. 288, and that case was recognised as settled law in *Schotsman v. Lancashire and Yorkshire Railway Company*,<sup>2</sup> decided by the full Court of Chancery Appeals. Lord Cairns, then Lord Justice, said: "The *Londos* was the ship of Cunliffe, and indicated as such for the delivery of the goods. The master was his servant. *No special contract* was entered into by the master to *carry the goods for or to deliver them to any person other than Cunliffe, the purchaser*. In point of fact no contract of affreightment was entered into, for the person to sue on such a contract would be Cunliffe, in whom was vested the property in the goods, and the person to be sued would be the same Cunliffe, as owner of the *Londos*. The *essential feature* of a stoppage *in transitu* as has been remarked in many of the cases, is that *the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with, and the purchaser who has not yet received them*. It was suggested here that the master of the ship

Nicholl, 5 Bing. N. C. 508; *per* Buller, J., in *Ellis v. Hunt*, 3 T. R. 466; *Stokes v. La Riviere*, reported by Lawrence, J., in giving the judgment of the Court in *Bohtlingk v. Inglis*, 3 East, 397; *Berndtson v. Strang*, L. R. 4, Eq. 481; 36 L. J. Ch. 879.

<sup>1</sup> Blackb. on Sales, 242; *Ogle v. Atkinson*, 5 Taunt. 759; *per cur.* in *Turner v. Liverpool Docks Company*, 6 Ex. 543, 20 L. J., Ex. 393; *Van Casteel v. Booker*, 2 Ex. 691.

<sup>2</sup> L. R. 2, Ch. Ap. 332; 36 L. J. Ch. 361.

was a person filling this character, but the master of the ship is the servant of the owner: and if the master would be liable because of the delivery of the goods to him, the same delivery would be a delivery to the owner, because delivery to the agent is delivery to the principal." Lord Chelmsford, C., gave an opinion to the same effect, and pointed out that if the vendor had desired to restrain the effect of the delivery, he should have taken a bill of lading with the proper endorsement, as was established in *Turner v. Liverpool Docks Trustees*.

In the foregoing case it was further held by both the learned lords, reversing Lord Romilly's judgment at the Rolls,<sup>1</sup> that there was no difference in the effect of the delivery, whether the buyer's ship was expressly sent for the goods, or whether it was a general ship belonging to the buyer, and the goods were put on board without any previous special arrangement.

No distinction in the effect of delivery on buyer's ship sent expressly for the goods, or on his general ship without previous arrangement.

Whether a vessel chartered by the buyer is to be considered his own ship, depends on the nature of the charter-party. If the charterer is, in the language of the law-merchant, owner for the voyage, that is if the ship has been demised to him, and he has employed the captain, so that the captain is his servant, then a delivery on board of such a chartered ship would be a delivery to the buyer: but if the owner of the vessel has his own captain and men on board, so that the captain is the servant of the owner, and the effect of the charter is merely to secure to the charterer the exclusive use and employment of the vessel, then a delivery by the vendor of goods on board, is not a delivery to the buyer, but to an agent for carriage. It is a pure question of intention in every case, to be determined by the terms of the charter-party.<sup>2</sup>

Where the delivery is on board a vessel chartered by the buyer.

In *Berndtson v. Strang*,<sup>3</sup> the subject was elaborately dis-

*Berndtson v. Strang.*

<sup>1</sup> L. R. 1, Eq. 349.

<sup>2</sup> Blackb. on Sales, 242; *Fowler v. McTaggart*, cited 7 T. R. 442, and 10 East, 522; *Inglis v. Usherwood*, 1 East, 515; *Bohtlingk v. Inglis*, 3 East, 381; see the cases collected in

*Maud & Poll. on Shipping*, pp. 296-8, 3rd ed.; and a further discussion of the subject in the late case of *Sandeman v. Scurr*, L. R. 2, Q. B. 86; 36 L. J., Q. B. 58.

<sup>3</sup> L. R. 4, Eq. 481; 36 L. J., Ch. 879.

cussed, and all the cases reviewed by Lord Justice Wood, (then V.-C.). The buyer had sent a vessel for the goods (the original contract, however, having provided that the seller was to send them on a vessel, delivered f. o. b.), and the vendor took a bill of lading, deliverable to "order or assigns," and indorsed the bill of lading to the buyer in exchange for the buyer's acceptances for the price. It was held, that the effect of taking the bill of lading in that form, from the master of the chartered ship, was to interpose him, as a carrier between the vendor and the vendee, and to preserve the right of stoppage to the former. The following instructive passages are extracted from the opinion of the learned lord: "Now there are two criteria, as it appears to me, with respect to the stoppage *in transitu*, viz., whether there is a transitus at all? and if so, where it is to end? If a man sends his own ship, and orders the goods to be delivered on board of his own ship, and the contract is to deliver them free on board, then the ship is the place of delivery, and the transitus is at an end just as much (as was said in *Van Casteel v. Booker*, 2 Ex. 691), as if the purchaser had sent his own cart, as distinguished from having the goods put into the cart of a carrier. Of course there is no further transitus after the goods are in the purchaser's own cart. There they are at home, in the hands of the purchaser, and the whole delivery is at an end. The next thing to be looked to is, *whether there is any intermediate person interposed between the vendor and the purchaser*. Cases may no doubt arise where the transitus may be at an end, although some person may intervene between the period of actual delivery of the goods and the purchaser's acquisition of them. The purchaser, for instance, may require the goods to be placed on board a ship chartered by himself, and about to sail on a roving voyage. In that case, when the goods are on board the ship everything is done, for the goods have been put in the place indicated by the purchaser, and there is an end of the transitus. But here, where the goods are to be delivered in London, the plaintiff, for greater security, takes the bill of lading in his own name,

and being content to part with the property in the goods, subject or not, as the case may be, to this right of stoppage *in transitu*, he hands over the bill of lading in exchange for the bill of exchange. In that ordinary case of chartering it appears to me that the *master is a person interposed between vendor and purchaser*, in such a way that the *transitus* is not at an end, and that the goods will not be parted with, and the consignee will not receive them into his possession until the voyage is terminated and the freight paid, according to the arrangement in the charter-party. \* \* \* The whole case here appears to me to turn upon whether or not it is the man's own ship that receives the goods, or whether he has contracted with some one else, *quà carrier*, to deliver the goods, so that according to the ordinary rule as laid down in *Bohtlingk v. Inglis*, 3 East, 381, and continually referred to as settled law upon the subject, the *transitus* is only at an end when the carrier has arrived at the place of destination, and has delivered the goods."

Before a bill of lading is taken, the vendor preserves his lien, and is not driven to the exercise of his right of stoppage, if he has taken or demanded the receipts for the goods in his own name: though this state of facts is sometimes treated as giving ground for the exercise of the right of stoppage.<sup>1</sup> If, however, the vessel were the purchaser's own vessel, and the receipts contained nothing to show that a bill of lading was to be delivered by which the vendor's control over the goods was to be retained, the principle in *Schotsman v. Lancashire and Yorkshire Railway Company*<sup>2</sup> would be applied, and the delivery would be held complete so as to divest both lien and right of stoppage.<sup>3</sup>

Goods may be still in transit, though lying in a warehouse to which they have been sent by the vendor on the purchaser's orders. Goods sold in Manchester to a merchant in New York, may be still in transit while lying in a warehouse in Liverpool. The question, and the sole question

Where vendor takes a receipt for goods in his own name lien not lost,

unless the vessel belonged to purchaser.

*Transitus* not ended till goods reach their ultimate destination.

Test question

<sup>1</sup> *Craven v. Ryder*, 6 Taunt. 433; Ch. 361.

*Ruck v. Hatfield*, 5 B. & Ald. 632.

<sup>2</sup> *Cowasjee v. Thompson*, 5 Moore,

<sup>3</sup> L. R. 2, Ch. App. 332; 36 L. J. P. C. C. 165.

for determining  
whether transit  
is ended.

for determining whether the transitus is ended, is, In what capacity the goods are held by him who has the custody? Is he the buyer's agent to *keep* the goods? or the buyer's agent to *forward* them to the destination intended at the time the goods were put in transit? If, in the case supposed, the goods in the Liverpool warehouse are there awaiting shipment to New York, in pursuance of the purchaser's original order to send him the goods to New York, they are still in transit, even though the parties in possession in Liverpool may be the general agents of the New York merchant for selling as well as forwarding goods. But if the buyer ordered his goods to Liverpool only, and they are kept there awaiting his further instructions, they are no longer in transit. They are in his own possession, being in possession of his agent, and may be sold in Liverpool or shipped to the East, or disposed of at the will and pleasure of the buyer. And it is well observed in the Treatise on Sales,<sup>1</sup> that "it then becomes a question depending upon what was done, and what was the intention with which it was done; and as the acts are often imperfectly proved, and in themselves equivocal, and the intention often not clearly known to the parties themselves, it is not surprising that there should be much litigation upon the point;" and "that the acts accompanying the transport of goods are less equivocal, less susceptible of two interpretations as to the character in which they are done, than are those accompanying a deposit of goods. The question, however, is still the same,—Has the person who has the custody of the goods got possession as an agent to *forward* from the vendor to the buyer, or as an agent to hold for the buyer?"<sup>2</sup>

Cases selected  
as examples.

A few of the cases offering the most striking illustrations of the distinction will now be presented.

Leeds v.  
Wright.

In *Leeds v. Wright*,<sup>3</sup> the London agent of a Paris firm had in the packer's hands in London, goods sent there by the vendor from Manchester, under the agent's orders; but it appeared that the goods were, at the agent's discretion, to

<sup>1</sup> Blackb. on Sales, 224.

<sup>2</sup> *Ibid.* p., 244.

<sup>3</sup> 3 B. & P. 320.

be sent where he pleased, and not for forwarding to Paris ; and it was held that the transitus was ended.

In *Scott v. Pettit*,<sup>1</sup> the goods were sent to the house of the defendant, a packer, who received all of the buyer's goods, the buyer having no warehouse of his own ; and there was no *ulterior* destination. Held, that the packer's warehouse was the buyer's warehouse, the packer having no agency except to hold the goods subject to the buyer's orders. *Scott v. Pettit.*

In *Dixon v. Baldwin*,<sup>2</sup> the facts were, that Battier and Son, of London, ordered goods of the defendants at Manchester, to be forwarded "to Metcalfe and Co. at Hull, to be shipped for Hamburg as usual ;"—the course of dealing of the Battiers being to ship such goods to Hamburg. Part of the goods were ordered in March, and part in May, and were sent to Hull as directed. The Battiers became bankrupt in July, and the vendors stopped the goods at Hull, including four bales actually shipped for Hamburg, which were relanded on the vendors' application, they giving an indemnity to Metcalfe. The latter, as witness, said, "that at the time of the stoppage he held the goods for the Battiers, *and at their disposal* ; that he accounted with the Battiers for the charges. The witness described his business to be merely an *expeditor* agreeable to the directions of the Battiers,—a *stage* and *mere instrument* between buyer and seller ; that he had no authority to sell the goods, and frequently shipped them without seeing them ; that the bales in question were to remain at his warehouse for the orders of Battier and Son, and he had no other authority than to forward them ; that at the time the goods were stopped, he was waiting for the orders of the Battiers ; that he had shipped the four bales, expecting to receive such orders, and relanded them because none had arrived." Lord Ellenborough held, on these facts, "that the goods had so far gotten to the end of their journey, *that they waited for new orders from the purchaser to put them again in motion*, to communicate to them *another substantive des-* *Dixon v. Baldwin.*

<sup>1</sup> 3 B. & P. 469.

<sup>2</sup> 5 East, 175.



tionation; and that *without such orders they would continue stationary.*" Lawrence and Le Blanc, JJ., concurred, but Grose, J., dissented on this point.

Valpy v.  
Gibson.

In *Valpy v. Gibson*,<sup>1</sup> which was a case very similar to the foregoing, the goods were ordered of the Manchester vendor, and sent to a forwarding house in Liverpool by order of the buyer, to be forwarded to Valparaiso; but the Liverpool house had no authority to forward till receiving orders from the buyer. The buyer ordered the goods to be relanded after they had been put on board, and sent them back to the vendor, with orders to re-pack them into eight packages instead of four; and the vendors accepted the instructions, writing—"We are now re-packing them in conformity with your wishes." Held, that the right of stoppage was lost; that the transitus was at an end; and that the re-delivery to the vendor for a new purpose could give him no lien. See, also, *Wentworth v. Outhwaite*,<sup>2</sup> *Dodson v. Wentworth*,<sup>3</sup> *Cooper v. Bill*,<sup>4</sup> *Smith v. Hudson*,<sup>5</sup> and *Rowe v. Pickford*.<sup>6</sup>

Cases where  
transitus was  
held not ended.

Reference will now be made to some of the cases in which the transitus was considered *not* at an end, where the goods had reached the custody of the buyer's agent, the agent's duty being merely to forward them.

Smith v. Goss.

In *Smith v. Goss*,<sup>7</sup> the buyer at Newcastle wrote to the vendor at Birmingham, to send him the goods by way of London or Gainsborough;—"if they are sent to London, address them to the care of J. W. Goss, with directions to send them by the first vessel for Newcastle." Lord Ellenborough said, that "the goods were merely at a stage upon their transit;" and the vendor's right of stoppage remained.

Coates v. Rail-  
ton.

In *Coates v. Railton*,<sup>8</sup> it appeared that the course of business was, that Railton at Manchester should purchase goods on account of Butler of London, and forward them to a branch of Butler's house in Lisbon, by whom the goods

<sup>1</sup> 4 C. B. 837.

<sup>2</sup> 10 M. & W. 436.

<sup>3</sup> 4 M. & G. 1080.

<sup>4</sup> 8 H. & C. 722; 34 L. J., Ex. 151.

<sup>5</sup> 4 B. & S. 431; 34 L. J., Q. B. 145.

<sup>6</sup> 8 Taunt. 83.

<sup>7</sup> 1 Camp. 282.

<sup>8</sup> 6 B. & C. 422.

were ordered through the London house; neither of the Butler firms had any warehouse at Manchester; and the vendor was told that the goods were to be sent to Lisbon as on former occasions. The goods were delivered at the warehouse of Railton, who had them calendared and made up, and was then to forward them to Liverpool for shipment to Lisbon. Held, that the transitus was not ended by the delivery to Railton. Bayley, J., said: "It is a general rule that where goods are sold to be sent to a particular *destination named by the vendee*, the right of the vendor to stop them continues until they arrive at that place of destination." After reviewing all the previous cases, the learned judge said: "The principle deduced from these cases is, that the *transitus is not at an end until the goods have reached the place named by the buyer to the seller as the place of destination.*" In this case it will be remarked, that Railton's agency from the beginning was to buy *and forward to Lisbon to the vendee*; and the goods were not to be held by him to await orders, or any other disposal of them.

So in *Jackson v. Nichol*,<sup>1</sup> where the goods were placed by the vendors, at Newcastle, at the disposal of Crawhall, an agent of the buyers, by a delivery order. Crawhall was a general agent of the buyers, who had been in the habit of receiving goods for them, and awaiting their orders, but in this particular instance had received instructions to forward the goods to the buyers in London *before the goods left the vendor's possession*; and on receiving the delivery order, he at once endorsed it to a wharfinger, "to go on board the *Esk*," and the wharfinger gave the order to a keelman, who went for the goods and put them on board the *Esk*. The *Esk* arrived in the port of London with the goods, and while moored in the Thames, the goods were put on board a lighter sent for them by the defendants, who were the wharfingers of the *Esk*, and the stoppage was made while the goods were on the lighter. The Court held that "the lead never came into the actual possession of Crawhall, the agent," that the series of acts done at Newcastle were but

*Jackson v.  
Nichol.*

<sup>1</sup> 5 Bing. N. C. 508.

"links in the chain of the machinery by which the lead was put in motion, and in a course of transmission from the seller's premises in Newcastle to the buyers' in London." Tindal, C. J., said also, "if the goods had been delivered into the possession of Crawhall as the agent of the buyers, there to remain until Crawhall received orders for their ulterior destination, *such possession would have been the constructive possession* of the buyers themselves, and the right to stop *in transitu* at an end."

Where goods have reached destination, but are still in carrier's possession.

Next come the cases where the goods have reached their ultimate destination, and the controversy is whether they still remain in the hands of the carrier, *quà carrier*, or if landed, whether the wharfinger or warehouseman is the agent of the buyer to receive them and hold them for the buyer's account. Blackburn on Sales has this passage:<sup>1</sup> "In none of these cases, it may be observed, was there any doubt as to the law: the question was one of fact, viz., in what capacity did the different agents hold possession? This question becomes still more difficult to answer when the party holding the goods acts in two capacities, as, for instance, a carrier who also acts as a warehouseman, and who may therefore have goods in his warehouse either as a place of deposit connected with the carriage, or as a place of deposit subject to the orders of the buyer: or a wharfinger who sometimes receives goods as agent of the ship-owner, and sometimes as agent of the consignee. In all such cases, as the leading fact, viz., the possession of the goods, is in itself ambiguous, it is necessary to gather the intention of the parties from their minor acts. If the possessor of the goods has the intention to hold them for the buyer, and not as an agent to forward, and the buyer intends the possessor so to hold them for him, the transitus is at an end: but I apprehend that both these intents must concur, and that neither can the carrier, of his own will, convert himself into a warehouseman, so as to terminate the transitus,

Both buyer and carrier must agree before the carrier can be converted

<sup>1</sup> p. 248.

without the agreeing mind of the buyer, (*James v. Griffin*, 2 M. & W. 623,) nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatsoever to retain possession against the buyer. (*Jackson v. Nichol*, 5 Bing. N. C. 508)."

into bailee to  
keep the goods  
for the buyer.

This view of the law has received full confirmation in subsequent cases.

In *James v. Griffin*, above quoted, and decided in 1837, the buyer, knowing himself to be insolvent, determined that he would not receive a cargo of lead that he had not paid for, but on its arrival at the wharf, where he had been in the habit of leaving his lead with the wharfingers as his agents, it became necessary to unload it, in order to set the vessel free. He therefore told the captain to put it on the wharf, but did not tell the wharfingers of his intention not to receive the lead: and they probably deemed themselves his agents to hold possession. After this the goods were stopped. Parke, Bolland, and Alderson, BB., held the transitus not ended, and that the buyer's intention not to receive being proven, the wharfingers could not receive as his agents without his assent. Abinger, C. B., dissented, on the ground that the intention of the buyer not having been communicated to the wharfingers, the agency of the latter could not be affected by it, and that the transitus was therefore ended. But all agreed that the sole question was whether the wharfingers were in possession *quà agents of the buyer*. And in *Jackson v. Nichol*,<sup>1</sup> repeated demands were made by the buyers for the goods after the arrival of the *Esk* in the Thames<sup>2</sup> before there was a stoppage, but the master of the vessel refused delivery, and the Court of Common Pleas held that the goods had not come into possession of the buyer. Nothing was here wanting to possession but the carrier's assent to put an end to the transitus,<sup>3</sup> and the principle seems to be exactly that of *Bentall v.*

*James v.*  
*Griffin.*

*Jackson v.*  
*Nichol.*

<sup>1</sup> 5 Bing. N. C. 508.

<sup>2</sup> *Ante*, p. 643.

<sup>3</sup> See *Foster v. Frampton*, 6 B. &

C. 107, where the assent of both parties was given.

Burn, and the class of cases like it, reviewed *ante*, pp. 128-129.

Bolton v. Lancashire and Yorkshire Railway Company.

In a recent and quite singular case, this question was considered by the Common Pleas. In *Bolton v. The Lancashire and Yorkshire Railway Company*,<sup>1</sup> the facts stated in the special case were that Wolstencroft, of Manchester, sold to Parsons, of Brierfield, certain goods lying at the defendant's station at Salford, and sent the buyer an invoice, and delivered part of them. Parsons then wrote refusing to take any more on account of the alleged bad quality. Wolstencroft had, on the same day, ordered the defendants to deliver another portion of the goods to Parsons, and wrote to the latter that he had done so, "according to your wish; the other four are lying at Salford awaiting your instructions." Parsons wrote back returning the invoice, and refusing the goods, saying: "We shall not have any more of it." Wolstencroft then sent a letter through his solicitor demanding payment of all the goods undelivered, and sent an order to the railway company, the defendants, to deliver the rest of the goods to Parsons. Some of the goods were taken by the carter of Parsons from the station at Brierfield without the knowledge of Parsons, and he at once returned them, and ordered all the goods to be sent back to Wolstencroft. The latter refused to receive them, and ordered them back to Parsons. The defendants then wrote to Parsons asking what they were to do with the goods, and Parsons replied: "We shall have nothing to do with them; they belong to Wolstencroft." Parsons afterwards became bankrupt, and the vendor sent a stoppage order to the defendants, in whose hands the goods still remained, and the goods were delivered to the vendor. The action was brought against the carriers by the assignees of the buyer. Held, that the transitus was not at an end. Erle, J., said: "I am of opinion that these goods did not cease to be *in transitu* by being at the Brierfield station. Before they arrived there, notice had been given by Parsons

<sup>1</sup> L. R. 1, C. P. 431; 35 L. J., C. P. 137.

to the vendor that he declined to receive them: and after their arrival Parsons gave the defendants orders to take them back again. The vendor at first refused to have anything to do with them; and thus, the goods *being rejected by both the vendor and by Parsons*, remained in the hands of the defendants. Under these circumstances, it seems to me the goods never ceased to be *in transitu*. It is clear, from the case of *James v. Griffin* (2 M. & W. 628), that the intention of the vendee to take possession is a material fact. So in *Whitehead v. Anderson* (9 M. & W. at p. 529). Parke, B., says "the question is *quo animo* the act is done. My notion has always been whether the consignee has taken possession, not whether the captain has intended to deliver it." \* \* \* It was urged by Mr. Holker, that being repudiated by both parties to the contract, the goods remained in the hands of the railway company as warehousemen for *the real owner*, that is for Parsons. There is no doubt but that the carrier may, and often does, become a warehouseman for the consignee; but that must be *by virtue of some contract or course of dealing between them* that when arrived at their destination the character of carrier shall cease, and that of warehouseman supervene." Willes, J., laid stress on the circumstance that the goods were, at the time of the sale, in possession of the railway company as warehousemen and bailees of the vendor, and thought that this agency had never ended, because the order for delivery to the buyer must be considered as subject to the condition "if he will receive them," but not to an absolute abandonment, or authority to throw them away, if the buyer would not have them. And on the main question the learned judge said: "Mr. Holker is undoubtedly right when he says that the property in these goods passed to the vendee. Unless the property passed, there would be no need of the right of stoppage *in transitu*. The only effect of the property passing is that from that time the goods are at the risk of the buyer. But it by no means follows that the buyer is to have possession, unless he is prepared to pay for the goods. \* \* \* The right to stop *in transitu* upon the bankruptcy

of the buyer remains, even when the credit has not expired, until the goods have reached the hands of the vendee, or of one who is his agent, as a warehouseman, or a packer, or a shipping agent, to give them a new destination. Until one of these events has happened, the vendor has a right to stop the goods *in transitu*. It must be observed that there is, besides the propositions I have stated, and which are quite familiar, one other proposition which follows as deducible from these, viz., that the arrival which is to divest the vendor's right of stoppage *in transitu* must be such that the buyer has *taken actual or constructive possession of the goods, and that cannot be as long as he repudiates them.*"

Whitehead v.  
Anderson.

This case is a complete confirmation of the principle that the carrier cannot change his character so as to become the buyer's agent to keep the goods for him, without the latter's assent; and the case of *Whitehead v. Anderson*,<sup>1</sup> a leading case on this subject, is as direct an authority for the converse principle that the buyer cannot force the carrier to become his bailee to keep the goods without the latter's assent. In that case the buyer having become bankrupt, his assignee on the arrival of the vessel with a cargo of timber went on board, and told the captain that he had come to take possession of the cargo, and went into the cabin into which the ends of the timber projected, and saw and touched the timber. The captain made no answer at first to the assignee's statement that he came to take possession, but afterwards told him at the same interview that he would deliver him the cargo when he was satisfied about his freight. They then went ashore together. The vendor then went on board and gave notice of stoppage to the mate who had charge of the vessel and cargo. Held, that no actual possession had been taken by the assignee, and that as the *captain had not contracted to hold as his agent*, the transitus was not at an end, and the stoppage was good.

Coventry v.  
Gladstone.

In the case just reported of *Coventry v. Gladstone*,<sup>2</sup> the consignee on the arrival of the vessel sent a barge for the

<sup>1</sup> 9 M. & W. 518. Tudor's L. C. on Mer. Law, 632.      <sup>2</sup> L. R. 6, Eq. 44.

goods, and the lighterman was told that the goods could not be got at, but that they would be delivered to him when they could be got at, and Lord Justice Wood (then Vice-Chancellor), held that this was not an attornment by the carrier to the consignee, that the character of the former as carrier was not changed into that of agent of the consignee, and that the goods were still liable to stoppage *in transitu*.

The carrier's change of character into that of agent to keep the goods for the buyer, is not at all inconsistent with his right to retain the goods in his custody till his lien upon them for carriage or other charges is satisfied.<sup>1</sup> Nothing prevents an agreement by the master of a vessel or other carrier to hold the goods after arrival at destination as agent of the buyer, though he may at the same time say, "I shall not let you take them till my freight is paid." The question is one of intention, and in *Whitehead v. Anderson*,<sup>2</sup> the captain was held not to have intended such an agreement by telling the assignee that he *would* deliver him the cargo when he was satisfied about the freight; Parke, B., saying, "There is no proof of such a contract. A promise by the captain to the agent of the assignee is stated, but it is no more than a promise without a new consideration to *fulfil the original contract*, and deliver in due course to the consignee on payment of freight, which leaves the captain in the same situation as before. *After the agreement he remained a mere agent for expediting the cargo to its original destination.*"

Carrier may become agent to keep goods for buyer while retaining his own lien.

The question whether the vendee may anticipate the end of the transitus, and thus put an end to the vendor's right of stoppage *in transitu*, was treated by most of the books<sup>3</sup> as settled in the affirmative on the authority of the cases in the note,<sup>4</sup> and in opposition to the ruling of Lord Kenyon,

Buyer may anticipate the end of the transitus, and thus put an end to the right of stoppage.

<sup>1</sup> *Allan v. Gripper*, 2 Cr. & J. 218; *seq.*; 1 Grif. & Holmes on Banky. but see *Crawshaw v. Edes*, 1 B. & C. 181, *post* 651.

<sup>2</sup> 9 M. & W. 518.

<sup>3</sup> Smith's L. C. vol. i., p. 755; Tudor's L. C. Mer. Law, 664-5; Houston on Stop. in Tran. 130, *et*

<sup>4</sup> *Mills v. Ball*, 2 Bos. & P. 457; *Wright v. Lawes*, 4 Esp. 82; *Oppenheim v. Russell*, 3 B. & P. 42; *Jackson v. Nichol*, 5 Bing. N. C. 508; *Whitehead v. Anderson*, 9 M. & W.



and the King's Bench in *Holst v. Pownall*.<sup>1</sup> And in *Whitehead v. Anderson*,<sup>2</sup> in which the judgment was prepared after advisement, Parke, B., expressed no doubt upon the subject. He said: "The law is clearly settled that the unpaid vendor has a right to retake the goods *before* they have arrived at the destination originally contemplated by the purchaser, *unless in the mean time* they came to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier, *with or without the consent* of the carrier, there seems to be no doubt that the transit would be at an end, though in the case of the absence of the carrier's consent, it may be a wrong to him for which he would have a right of action." There was, however, no direct decision on the point, and it rested on *dicta* till the recent case of *The London and North-Western Railway Company v. Bartlett*,<sup>3</sup> in which the Exchequer of Pleas held that the carrier and consignee might agree together for the delivery of goods at any place they pleased, and Bramwell, B., said it would "probably create a laugh anywhere except in a court of law, if it was said a carrier could not deliver to the consignee short of the particular place specified by the consignor."

London and  
North-Western  
Railway Com-  
pany v. Bart-  
lett.

In *Blackburn on Sales*,<sup>4</sup> the learned author does not yield assent to that passage in the opinion of Parke, B., above quoted, in which it is intimated that "the vendee can improve his position by a tortious taking of actual possession against the will of the carrier," in cases where the carrier has a right to refuse to allow the vendee to take possession. The doubt thus suggested seems to be justified by the decision in *Bird v. Brown*,<sup>5</sup> which is just the converse of the case supposed of a tortious taking of possession by the purchaser from the carrier. In that case, the carrier tortiously refused possession to the purchaser when the goods had arrived at destination, and the Exchequer Court held,

Buyer's rights  
of possession  
not affected by  
carrier's *tortious*  
refusal to de-  
liver, and the  
right of stop-  
page is at an  
end.

518; *Foster v. Frampton*, 6 B. & C. 107; *James v. Griffin*, 2 M. & W. 633.

<sup>1</sup> 1 Esp. 240.

<sup>2</sup> See *ante*, p. 649, n. 4.

<sup>3</sup> 7 H. & N. 400; 31 L. J., Ex. 92.

<sup>4</sup> p. 259.

<sup>5</sup> 4 Ex. 786.

after advisement and in very decided language, that the purchaser's rights could not be impaired by the carrier's wrongful refusal to deliver; that the transitus was at an end; and the right of stoppage gone.

Of course the mere arrival of the goods at destination will not suffice to defeat the vendor's rights. The vendee must take actual, if he has not obtained constructive possession. What will amount to taking actual possession is a question in relation to which much of the law already referred to, in connection with actual receipt, under the Statute of Frauds,<sup>1</sup> and delivery sufficient to divest lien,<sup>2</sup> will be found applicable.

Right of stoppage continues after arrival at destination until vendee takes possession.

In *Whitehead v. Anderson*,<sup>3</sup> it was held, as we have seen, that going on board the vessel and touching the timber was not taking it into possession, and *per cur*: "It appears to us very doubtful, whether an act of marking or taking samples or the like, without any removal from the possession of the carrier, though done with the intention to take possession, would amount to a constructive possession, unless accompanied by such circumstances as to denote that the carrier was intended to keep and assented to keep the goods in the nature of an agent for custody."

What is such possession?

In *Crawshay v. Edes*,<sup>4</sup> the carrier having reached the consignee's premises, began unloading, and put a part of the goods on his wharf, but hearing that the consignee had absconded and was bankrupt, took them back again on board the barge; and it was held that the right of stoppage remained, and that there had been no delivery of any part of the goods.

*Crawshay v. Edes.*

Whether delivery of part, when not retracted under the peculiar circumstances shown in *Crawshay v. Edes*, amounts to delivery of the whole, is always a question of intention, as shown *ante*, pp. 608, *et seq.*, where the cases mentioned in the note<sup>5</sup> have been reviewed; and the general rule was

Delivery of part is not delivery of the whole unless it be shown that it was so intended.

<sup>1</sup> *Ante*, p. 127, *et seq.*

<sup>2</sup> *Ante*, p. 600, *et seq.*

<sup>3</sup> 9 M. & W. 518.

<sup>4</sup> 1 B. & C. 181.

<sup>5</sup> *Dixon v. Yates*, 5 B. & A. 313; *Betts v. Gibbins*, 2 A. & E. 78; *Tanner v. Scovell*, 14 M. & W. 28; *Slubey v. Heyward*, 2 H. Bl. 504; *Ham-*

there deduced, that a delivery of part is not a delivery of the whole, unless the circumstances show that it was intended so to operate.

Delivery into the possession of a buyer, even after his bankruptcy, or into that of his assignees, ends the transitus.

The bankruptcy of the buyer not being in law a rescission of the contract, and the assignees being vested with all his rights, the delivery of the goods into the buyer's warehouse after his bankruptcy, or an actual possession of them taken by his assignees, will suffice to put an end to the transitus, and to determine the right of stoppage.<sup>1</sup>

Buyer on becoming insolvent may rescind the contract,

Where the buyer has become insolvent after his purchase, he has a right to rescind the contract, with the assent of his vendor, while the goods are still liable to stoppage; and then the subsequent delivery of the goods into the buyer's possession cannot affect the vendor's rights, because the *property* in the goods will not be in the buyer: or he may refuse to take *possession*, and thus leave unimpaired the right of stoppage *in transitu*, unless the vendor be anticipated in getting possession by the assignees of the buyer. The subject has been considered *ante*, pp. 374 to 376, where the cases are referred to.

or refuse to receive possession, and vendor's right of stoppage will remain unimpaired.

#### SECTION IV.—HOW IS THE RIGHT EXERCISED ?

No particular mode of stoppage required.

No particular form or mode of stoppage has been held necessary in any case; and Lord Hardwicke once said, that the vendor was so much favoured in exercising it, as to be justifiable in getting his goods back by any means not criminal, before they reached the possession of an insolvent vendee.<sup>2</sup> All that is required is some act or declaration of the vendor countermanding delivery. The usual mode is a simple notice to the carrier, stating the vendor's claim, for-

The usual mode is a simple notice to carrier forbidding delivery to vendee.

*mond v. Anderson*, 1 B. & P., N. R. 69; *Bunney v. Poyntz*, 4 B. & Ad. 568; *Simmons v. Swift*, 5 B. & C. 857; *Miles v. Gorton*, 2 Cr. & M. 574; *Jones v. Jones*, 8 M. & W. 431; *Wentworth v. Outhwaite*, 10 M. &

W. 436.

<sup>1</sup> *Ellis v. Hunt*, 3 T. R. 467; *Tooke v. Hollingworth*, 5 T. R. 226; *Scott v. Pettit*, 3 B. & P. 469; *Inglis v. Usherwood*, 1 East, 515.

<sup>2</sup> 1 Atk. 250.

bidding delivery to the vendee, or requiring that the goods shall be held subject to the vendor's orders.

In *Litt v. Cowley*,<sup>1</sup> where notice had been given to the carrier not to deliver the goods to the vendee, the carrier's clerk made a mistake, and delivered the package to the buyer, who opened it and sold part of the contents; and then became bankrupt. The assignees claimed to hold the goods, but were unsuccessful. Gibbs, C. J., in delivering judgment, said: "It was formerly held, that unless the vendor recovered back actual possession of the goods by a corporeal seizure of them, he could not exercise his right of stoppage *in transitu*. Latterly it has been held, that notice to the carrier is sufficient; and that if he deliver the goods after such notice, he is liable. That doctrine cannot be controverted, and is supported by all the modern decisions. In the present case, the plaintiff gave notice to the carriers at the place whence the boat sailed, and it would be monstrous to say that after such notice, a transfer made by their mistake should be such as to bind the plaintiffs, and to vest a complete title in the bankrupts and their representatives. \* \* \* As soon as the notice was given, the property returned to the plaintiffs, and they were entitled to maintain trover, not only against the carriers, but against the assignees of the bankrupts, or any other person." So far as the *dictum* is concerned, that the effect of the stoppage was to revest the *property*, the law is now otherwise;<sup>2</sup> but that it reverts the *possession*, so as to restore to the vendor his lien, is undoubted.

In *Bohtlingk v. Inglis*,<sup>3</sup> a demand for the goods made by the vendor's agent on the master of the ship, was held a sufficient stoppage; and in *Ex parte Walker and Woodbridge*,<sup>4</sup> it was decided that an entry of the goods at the Custom House by the vendor, on the arrival of the vessel, in order to pay the duties, was a valid stoppage, as against

*Bohtlingk v. Inglis.*

*Ex parte Walker and Woodbridge.*

<sup>1</sup> 7 Taunt. 168; 2 Marsh. 457.

<sup>2</sup> *Post*, sec. V.

<sup>3</sup> 3 East, 397.

<sup>4</sup> Cited in Cooke's Bankrupt Law, 402.

the assignees of the bankrupt purchaser, who afterwards got forcible possession of the goods when landed.

Northey v.  
Field.

In *Northey v. Field*,<sup>1</sup> wine bought by the bankrupts was landed from the vessel and put in the King's cellars, according to the excise law, where it was to remain until the owner paid duty and charges; but if not paid within three months, then to be sold, and the excess of the proceeds, after payment of duty and charges, to be paid to the owner. The assignees petitioned to have the wine, and it was also claimed by the vendor's agent while in the King's cellar, but it was sold at the end of the three months under the law. Lord Kenyon held, that the claim made by the vendor was a good stoppage *in transitu*, the wine being *quasi in custodia legis*.<sup>2</sup>

The notice of  
stoppage must  
be given to the  
person in pos-  
session;

The notice of the stoppage must be given to the person in possession of the goods, or if to his employer, then under such circumstances and at such time as to give the employer opportunity by using reasonable diligence to send the necessary orders to his servant. In *Whitehead v. Anderson*,<sup>3</sup> the vendor attempted to effect a stoppage of a cargo of timber while on its voyage from Quebec to Port Fleetwood, in Lancashire, by giving notice to the shipowner in Montrose, who thereupon sent a letter to await his captain's arrival at Fleetwood. Parke, B., delivering the judgment, said: "The next question is whether the notice to the shipowner, living at Montrose, is such a [valid] stoppage of the cargo, then being on the high seas, on its passage to Fleetwood. We think it was not: for to make a notice effective as a stoppage *in transitu* it must be given to the person who has the *immediate custody* of the goods: or if given to the principal, whose servant has the custody, it must be given as it was in the case of *Litt v. Cowley*, at such a time and under such circumstances, that the principal by the exercise of reasonable diligence may communicate it to his servant in time to prevent the delivery to the consignee; and to hold that a notice to a principal at a distance is sufficient to

or to the em-  
ployer, in time  
to enable him  
to send notice  
to his servant  
not to deliver.

<sup>1</sup> 2 Esp. 613.

Ship. 439.

<sup>2</sup> See *Nix v. Olive*, Abbott on

<sup>3</sup> 9 M. & W. 518.

revest the property in the unpaid vendor, and render the principal liable in trover for a subsequent delivery by his servants to the vendee, when it was impossible from the distance and want of means of communication to prevent that delivery, would be the height of injustice. The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery, and in the present case such diligence was used."

The mode of exercising the right of stoppage underwent careful investigation in the Admiralty Court in the case of *The Tigress*.<sup>1</sup> It was there determined by Dr. Lushington :

*First.* That a vendor's notice to stop, made it the duty of the master of the vessel to refuse delivery to the vendee to whom a bill of lading had been endorsed, and was sufficient without any representation that the bill of lading had not been transferred by the vendee.

Vendor need not inform the master of vessel that the bill of lading is still in possession of buyer.

*Secondly.* That the master's refusal to acquiesce in the vendor's claim of stoppage was a *breach of duty*, giving jurisdiction to the Admiralty Court.

*Thirdly.* That the vendor's right included the right of demanding *delivery to himself*, and that the carrier has no right to say that he will retain the goods for delivery to the true owner, after the conflicting claims have been settled.

Master's duty is to deliver goods to vendor, not simply to retain them till claims have been settled.

*Fourthly.* That the stoppage is at the vendor's peril, and it is incumbent on the master to give effect to a claim as soon as he is satisfied that it is made by the vendor, unless *he is aware of a legal defeasance* of the vendor's claim; but it is not a matter ordinarily within his cognisance, whether or not the buyer has endorsed over a bill of lading to a third person.

*Fifthly.* That if bills of lading are presented to the master by two different holders, "he is not concerned to examine the best right in the different bills; all he has to do is to deliver upon one of the bills."

This last proposition was said by the learned judge to be unnecessary to the decision. It was stated on the authority

Master as bailee delivers at his peril, and if in-

<sup>1</sup> 32 L. J., Adm. 97.

demnity is refused may file a bill of interpleader in chancery.

of *Fearon v. Bowers*, reported in the notes to *Lickbarrow v. Mason*,<sup>1</sup> but is very doubtful law; for it is well settled that a bailee delivers at his peril, that he is bound to decide between conflicting claimants to goods in his possession, that he is liable in trover if he delivers to the wrong person, and that his only mode of protecting himself is to take an indemnity, and if that be refused, to file a bill of interpleader in chancery.<sup>2</sup> This is clearly the opinion of Blackburn, J., for in the *Treatise on Sales*, he adverts to it as unquestionable law, in these words; "as the carrier obeys the stoppage *in transitu at his peril*, if the consignee be in fact solvent, it would seem no unreasonable rule to require that at the time the consignee was refused the goods, he should have evidenced his insolvency by some overt act."<sup>3</sup> In the opinion delivered in '*The Tigress*,' this suggestion is rejected, the judge saying distinctly, that the proof of the conditions on which the vendor's rights depend, would always be difficult, often impossible at the time of their exercise; "for instance, whether the vendee is insolvent may not transpire till afterwards, when the bill of exchange given for the goods becomes due; for it is as I conceive clear law, that the right to stop does not require the vendee to have been found insolvent."

Stoppage must be on behalf of vendor in assertion of his paramount right to the goods.

The stoppage to be effectual must be on behalf of the vendor, in the assertion of his rights as paramount to the rights of the buyer.<sup>4</sup>

#### SECTION V.—HOW MAY IT BE DEFEATED?

Vendor's right defeasible only by transfer of bill of lading to a *bond fide* endorsee for value.

The vendor's right of stoppage *in transitu* is defeasible in one way only, and that is when the goods are represented by a bill of lading, which is a symbol of property, and when the vendee, being in possession of the bill of lading with

<sup>1</sup> 1 H. Bl. 364; 1 Sm. L. C. 723 (6th ed.).

<sup>2</sup> p. 266.

<sup>3</sup> *Wilson v. Anderton*, 1 B. & Ad. 450.

<sup>4</sup> *Ib.* 266. *Siffkin v. Wray*, 6 East, 371; *Mills v. Ball*, 2 B. & P. 457.

the vendor's assent, transfers it to a third person, who *bonâ fide* gives value for it.

The Bills of Lading Act, 18 & 19 Vict. c. 8 (referred to *ante*, p. 611), and the Factors' Act (*ante*, pp. 607, *et seq.*), have largely extended the effects of these mercantile instruments, and the rights of the holders of them. By the common law, as established in *Lickbarrow v. Mason*,<sup>1</sup> and the numberless cases since decided on the authority of that celebrated case, the right to stop *in transitu* was defeasible by the transfer of the bill of lading to a *bonâ fide* endorsee; but if the endorsement was by a factor or consignee, it was only valid in case of sale, not of pledge: and even when by the vendor himself, the transfer operated as a conveyance of the property in the goods, but not as an *assignment of the contract* so that the endorsee was not empowered to bring suit on the bill of lading.<sup>2</sup> But now, by the effect of the Factors' Acts, the endorsement of a bill of lading by factors or consignees, entrusted with it as agents of the owners, is as effective as that of the vendor would be in giving validity to "any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents [including bills of lading], as also for any further or continuing advance in respect thereof, and such contract or agreement shall be binding upon, and *good against the owner of such goods*, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." So that as regards the effect of the transfer of the bill of lading, it now makes no difference whether the consignor was vendor, or merely consigning goods for sale, his rights of stoppage will be defeated by the assignment of the bill of lading, even to a person not a vendee, but from whom money has been borrowed on the

By common law consignee could only defeat vendor's rights by resale, but now, by the Factors' Act, by pledge also.

Transfer of bill of lading is now an assignment of the contract.

<sup>1</sup> 1 Smith's L. Cases, 199 (6th ed.). W. 403; *Howard v. Shepherd*, 9 C.

<sup>2</sup> *Thompson v. Dominy*, 14 M. & B. 296.



faith of it. And by the Bills of Lading Act, all rights of action and liabilities upon the bill of lading are to vest in and bind the consignee or *indorsee*, to whom the property in the goods shall pass.

It is not within the province of this treatise to examine the general law in relation to Bills of Lading, for which the authorities are collected in the notes to *Lickbarrow v. Mason*,<sup>1</sup> but only the effect of transferring these documents in defeating the right of stoppage.

Bill of lading not negotiable like a bill of exchange.

Transferee has no better title than endorser.

The first point to be noticed is, that a bill of lading is not negotiable in the same sense as a bill of exchange, and that therefore the mere honest *possession* of a bill of lading endorsed in blank, or in which the goods are made deliverable to the bearer, is not such a title to the goods as the like possession of a bill of exchange would be to the money promised to be paid by the acceptor. The *endorsement* of a bill of lading gives no better right to the goods than the indorser himself had (except in cases where an agent *entrusted with it* may transfer it to a *bonâ fide* holder under the Factors' Act), so that if the owner should lose or have stolen from him a bill of lading endorsed in blank, the finder or the thief could confer no title upon an innocent third person.<sup>2</sup>

But *bonâ fide* endorsee will hold goods against vendor who has been defrauded.

But the title of *bonâ fide* third persons will prevail against the vendor who has *actually* transferred the bill of lading to the vendee, although he may have been induced by the vendee's fraud to do so,<sup>3</sup> because, as we have seen,<sup>4</sup> a transfer obtained by fraud is only voidable, not void.

Where bill of lading is shown to have been endorsed to holder for value, this is *prima facie* evidence of ownership, without proving that previous endorsement was for value.

In *Dracachi v. The Anglo-Egyptian Navigation Company*<sup>5</sup> the plaintiff proved that the consignor had endorsed the bill of lading to A., and that A. had endorsed it to the plaintiff for value, so as to pass the property; and it was objected by defendant that there was no proof that the first endorsement was for value *so as to pass the property* under the first

<sup>1</sup> 1 Sm. Lead. Cas. 199 (6th ed.).

<sup>2</sup> *Gurney v. Behrend*, 3 E. B. 622; 23 L. J., Q. B. 265; and see *Coventry v. Gladstone*, L. R. 6, Eq. 44.

<sup>3</sup> *Pease v. Gloaghec*, L. R. 1, P. C. App. 219.

<sup>4</sup> *Ante*, pp. 319, *et seq.*

<sup>5</sup> L. R. 3, C. P. 190; 37 L. J., C. P.

section of the Bills of Lading Act; but the Court held that the transfer by the consignor was strong *prima facie* evidence that the property had passed, sufficient to justify the jury in finding that the property in the goods was in the plaintiff.

If the consignor or vendor transfers the bill of lading as security for advances, and the bill of lading is then transferred back on the repayment of the advances, the rights of the original consignor or vendor return to him, and he is remitted to all his remedies under the original contract.<sup>1</sup>

Where consignor or vendor gets back bill of lading, after transfer, his original rights revive.

But the vendor's rights of stoppage *in transitu* may be defeated in part only, for the bill of lading may be transferred as a pledge or security for the debt, and then in general the *property* in the goods remains in the vendee; but even if by agreement the *property* in the goods has been assigned as well as the *possession*, it is only a *special* property that is thus transferred, and the *general* property remains in the vendee. On these grounds, therefore, the vendor's right of stoppage will remain so far as to entitle him to any surplus proceeds after satisfying the creditor to whom the bill of lading was transferred as security; and the vendor will have the further equitable right of insisting on *marshalling the assets*; that is to say, of forcing the creditor to exhaust any other securities held by him towards satisfying his claim before proceeding on the goods of the unpaid vendor.<sup>2</sup>

Where bill of lading has been endorsed as a pledge, vendor's right of stoppage remains for surplus after pledgee is satisfied;

and vendor may force pledgee to marshal the assets.

The transfer of the bill of lading, in order to affect the vendor's right of stoppage *in transitu*, must be, both by the statute and the common law, to a *bona fide* third person. This means, not without notice that the goods have not been paid for, because a man may be perfectly honest in dealing for goods that he knows not to have been paid for,<sup>3</sup>

Transfer of bill of lading will defeat vendor's rights, even when endorsee knows that goods have not been paid for, if the transaction is honest.

<sup>1</sup> *Short v. Simpson*, L. R. 1, C. P. 248; 35 L. J., C. P. 147.

<sup>2</sup> *In re Westzynthius*, 5 B. & Ad. 817; *Spalding v. Ruding*, 6 Beav. 376; S. C. on App. 15 L. J., Ch. 374, and in the note to *Berndtson v.*

*Strang*, L. R. 4, Eq. 486. See as to marshalling assets in equity, *Aldrich v. Cooper*, and notes, 2 Tudor's L. C. in Eq. 80, *et seq.*

<sup>3</sup> *Cuming v. Brown*, 9 East, 506.

but without notice of such circumstances as render the bill of lading *not fairly and honestly assignable*.<sup>1</sup> Thus in *Vertue v. Jewell*,<sup>2</sup> where Lord Ellenborough held that the vendor had no right of stoppage, he said expressly that if such a right had existed against the consignee, he would have enforced it against Ayres, the endorsee of the bill of lading, because Ayres took the assignment of the bill of lading with a *knowledge of the insolvency* of the consignee.

SECTION VI.—WHAT IS THE EFFECT OF A STOPPAGE  
IN TRANSITU.

Effect is to  
restore the  
goods to  
vendor's pos-  
session, not to  
rescind the sale.

There can no longer be a reasonable doubt that the true nature and effect of this remedy of the vendor is simply to restore the goods to his *possession*, so as to enable him to exercise his rights as an unpaid vendor, not to rescind the sale.

The point has never been directly decided, because the circumstances are rarely such as to raise the question, but if there should be a considerable advance in the price of the goods sold, it is obvious that the subject would acquire a practical importance.

Wentworth v.  
Outhwaite.

The series of cases in which the question has been examined may be found cited in 1 Smith's Leading Cases, 748; and in *Wentworth v. Outhwaite*,<sup>3</sup> where the point was raised and elaborately argued, Parke, B., gave the judgment, in 1842, in which he declared that in his own opinion and that of his brethren, with the exception of Lord Abinger, who dissented, the effect of the stoppage was "to replace the vendor in the same position as if he had not parted with the possession and entitle him to hold the goods till the price is paid down."

Martindale v.  
Smith.

In *Martindale v. Smith*,<sup>4</sup> however, as we have seen, where the point was raised and determined after considera-

<sup>1</sup> *Ib.*, *Salomons v. Nissen*, 2 T. R. 681.      Campbell, 4 Burr. 2046.

<sup>2</sup> 10 M. & W. 436.

<sup>3</sup> 4 Camp. 31. See, also, *Wright v.*

<sup>4</sup> 1 Q. B. 389.

tion by the Queen's Bench, whether the vendor had a right to reinvest the property in himself by reason of the vendee's failure to pay the price at the appointed time, the Court conclude the expression of a very decided opinion in the negative by the statement, "the vendor's right, therefore, to detain the thing sold against the purchaser must be considered as a right of lien till the price is paid, not a right to rescind the bargain."

In *Valpy v. Oakeley*,<sup>1</sup> where the assignees of the bankrupt sued the defendant in assumpsit for non-delivery of goods bought by the bankrupt, of which the defendants stopped delivery after the bankrupt had become insolvent, although they had received from him acceptances for the price, the Court held that when the bills were dishonoured, the parties were in the same position as if bills had never been given at all. It did not hold the contract rescinded, but decided that the assignees were entitled to recover the value of the goods less the unpaid price, that is, merely nominal damages unless the market has risen. And this case was followed by the same Court in *Griffiths v. Perry*,<sup>2</sup> in which, under similar circumstances, it was held, that the vendor's right was a right similar to that of stoppage *in transitu* (that is to say, that the vendor need not go through the idle form of putting the goods into a cart and then taking them out, but had the right to retain them by a *quasi* stoppage *in transitu*), and the Court gave to the assignees of the bankrupt nominal damages for the vendor's stoppage of the delivery; a judgment only possible on the theory that the contract had not been rescinded.

*Valpy v.  
Oakeley.*

But the strongest ground for holding the question to be now at rest is, that courts of equity have assumed regular jurisdiction of bills filed by vendors to assert their rights of stoppage *in transitu*; a jurisdiction totally incompatible with the theory of a rescission of the contract; for if the contract was rescinded, there would be no privity in a court of equity between the parties. This was pointed out by

This is settled  
in the equity  
decisions.

<sup>1</sup> 16 Q. B. 941; 20 L. J., Q. B. 380.    <sup>2</sup> 1 E. & E. 680; 28 L. J., Q. B. 204.

Lord Cairns, in *Schotsman v. The Lancashire and Yorkshire Railway Company*; <sup>1</sup> and in that case both his Lordship and Lord Chelmsford declared that they entertained no doubt of the jurisdiction of a court of equity, in the case of a bill filed, to enforce the vendor's right of stoppage.

<sup>1</sup> L. R. 2, Ch. App. 332.

## PART II.

### RIGHTS AND REMEDIES OF THE BUYER.

#### CHAPTER I.

##### BEFORE OBTAINING POSSESSION OF THE GOODS.

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THE breach of contract of which the buyer complains may arise from the vendor's default in delivering the goods, or from some defect in the goods delivered; there may be a breach of the principal contract for the transfer of the property and delivery of possession, or of the collateral contract of warranty either of quality or title.

Right to avoid the contract for mistake, failure of consideration, fraud, or illegality.

The buyer's right to *avoid* the contract for mistake, failure of consideration, fraud, or illegality, has been discussed in the Third Book of this treatise. There remain therefore for consideration, 1st. The remedies of the buyer before obtaining possession of the goods sold; which must be subdivided into cases where the contract is executory only, and cases where the property has passed. 2ndly. The remedies of the buyer after having taken actual possession of the goods.

#### SECTION I.—WHERE THE CONTRACT IS EXECUTORY.

Only remedy is action for the breach of contract.

Where by the terms of the contract the property has not passed to the buyer in the thing which the vendor has agreed to sell, it is obvious that the buyer's remedy for the breach of the vendor's promise is the same as that which exists in all other cases of breach of contract. He may recover damages for the breach, but has no special remedy growing out of the relations of vendor and vendee.

What damages buyer may recover.

The damages which the buyer may recover in such an action are in general the difference between the contract price and the market value of the goods at the time when the contract is broken, as explained by Tindal, C. J., in the opinion delivered in *Barrow v. Arnaud*, cited *ante*, p. 559; and numerous instances of the application of this rule are to be found in the reported cases.<sup>1</sup>

<sup>1</sup> *Boorman v. Nash*, 9 B. & C. 145; L. J., Q. B. 381; *Griffiths v. Perry*, 1 Valpy v. Oakeley, 16 Q. B. 941; 20 E. & E. 630, 28 L. J., Q. B. 204;

But the law distinguishes the damages which may be claimed on a breach of contract, and allows not only *general* damages, that is, such as are the necessary and immediate result of the breach,<sup>1</sup> but *special* damages, which are such as are a natural and proximate consequence of the breach, although not in general following as its immediate effect.<sup>2</sup> It is by reason of this distinction, that damages of the latter class are not recoverable, unless stated in the declaration with sufficient particularity to enable the defendant to prepare himself with evidence to meet the demand at the trial, while those of the former class are sufficiently particularised by the very statement of the breach.<sup>3</sup>

Damages general or special.

Special damages must be stated in declaration.

The rule on the subject of the measure of damages on breach of contract was thus laid down in *Hadley v. Baxendale*,<sup>4</sup> and is now regarded as perfectly settled law: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be such as may fairly and reasonably be considered, either arising naturally, *i. e.* according to the usual course of things, from such breach of contract itself; or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so

Rule in *Hadley v. Baxendale*.

*Peterson v. Eyre*, 13 C. B. 353; *Josling v. Irvine*, 6 H. & N. 512; 30 L. J., Ex. 78; *Boswell v. Kilbarn*, 15 Moore, P. C. C. 309; *Chinery v. Viall*, 5 H. & N. 288, 29 L. J., Ex. 180; *Wilson v. Lancashire and Yorkshire Railway Company*, 9 C. B., N. S. 632, 30 L. J. C. P. 232.

<sup>1</sup> *Boorman v. Nash* 9 B. & C. 145.

<sup>2</sup> *Crouch v. Great Northern Railway Company*, 25 L. J., Ex. 137, 11 Ex. 742; *Hoey v. Felton*, 11 C. B., N. S. 143, 31 L. J., C. P. 105.

<sup>3</sup> *Smith v. Thomas*, 2 Bing. N. C. 372; 1 Wms. Saunders, 243 d, n. 5.

<sup>4</sup> 9 Ex. 341—354; 23 L. J., Ex. 179.



known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract."

In accordance with the above principles, the rule which fixes the amount of damages recoverable by the buyer at the difference between the contract and market price at the date of the breach, has in several instances been departed from by the Courts.

Where vendor  
by his own con-  
duct enhances  
the damage.  
*Loder v.*  
*Kekulé.*

In *Loder v. Kekulé*,<sup>1</sup> the buyer had paid in advance for the goods to be supplied, and they were found on delivery to be of inferior quality, and were rejected, so that the amount of the damages ought to have been fixed with reference to the market price on that day; and the buyer did not resell the goods till some time afterwards, when the market price had fallen; but the Court being of opinion that it was the vendor, who by his conduct had delayed the sale, and the jury having found that the resale was within a reasonable time, the buyer recovered as damages the full difference between the market value at the date of the breach, and the price subsequently obtained on the resale.

Where the re-  
purchase was  
delayed at ven-  
dor's request,  
and for his  
benefit.  
*Ogle v. Earl*  
*Vane.*

So in *Ogle v. Earl Vane*,<sup>2</sup> decided in Hilary Term, 1868, where the defendant failed to make delivery of 500 tons of iron according to contract, owing to an accident to his furnaces, the general rule was not applied, because the Court and jury were of opinion that the plaintiff's delay in buying other iron, to replace that not delivered, had taken place at the defendant's request and for his benefit. The plaintiff was therefore entitled to claim the largely increased damages caused by a rise in price in the market during the delay. It was further held that the buyer's consent to wait at the vendor's request was no new contract which required

<sup>1</sup> 3 C. B., N. S. 128; 27 L. J., C. B. in Cam. Scacc.; S. C. L. R. 2, Q. P. 27.

<sup>2</sup> L. R. 3, Q. B. 272; 37 L. J., Q.

to be proved under the Statute of Frauds, because the buyer retained the power of suing at any moment he pleased for breach of the original contract, but was an independent fact bearing only on the question of damages, and justifying an exception from the general rule.

In *Fletcher v. Tayleur*,<sup>1</sup> the plaintiff claimed special damages for the non-delivery of a ship which the defendant had agreed to construct for him, and it was proved that the ship was intended for a passenger-ship to Australia; that the defendant knew this; that if the ship had been delivered according to contract the plaintiffs would have made a profit of 7000*l.* on the voyage, but that in consequence of the fall in freight, they made only 4280*l.* on the voyage when the vessel was delivered. The jury gave the plaintiff 2750*l.* damages. Crowder, J., read to the jury as the rule the passage above quoted (p. 665) from the opinion in *Hadley v. Baxendale*.<sup>2</sup> On motion for new trial, Hugh Hill insisted that the probable profits of a voyage were too vague a criterion by which to measure damages; but the Court refused to interfere on the ground that both parties had agreed that the question for the jury was, What was the loss sustained by the non-delivery of the ship at the time stipulated for by the contract? and that this question was properly left to them by Crowder, J. In the course of the trial, Jervis, C. J., suggested that "it would be convenient if some general rule were established as to the measure of damages in all cases of breach of contract. Would not an average percentage of mercantile profits be the fair measure of damages for a breach of a mercantile contract? That is very much the result of the decision in *Hadley v. Baxendale*." This suggestion met the concurrence of Willes, J., but no further notice was taken of it, on the ground that the question had not been raised at the trial.

Probable profits of a voyage, as damages for delay in delivering a ship.  
*Fletcher v. Tayleur.*

*Cory v. Thames Iron Works Company*,<sup>3</sup> decided by the Queen's Bench in Hilary Term, 1868, was very similar in its features with *Fletcher v. Tayleur*, but the decision was

*Cory v. Thames Iron Works Company.*

<sup>1</sup> 17 C. B. 21; 25 L. J., C. P. 65.

L. R. 3, Q. B. 181; 37 L. J., C. P.

<sup>2</sup> 9 Ex. 341; 23 L. J., Ex. 179.

Vendor always bound for such damages as result from buyer's being deprived of the ordinary use of the chattel.

Parol evidence not allowed where contract was in writing, to show special circumstances in order to enhance damages.

Brady v. Oastler.

Damage to crops by delay in delivering threshing engine.

Smeed v. Foord.

different, because the defendants were not made aware of the special purpose which the buyer had in view. The plaintiff claimed damages for the non-delivery at the specified time, of the hull of a floating boom derrick, which they intended to use for working machinery in the discharge of coals; but the defendants were not aware of this, and believed that the hull was wanted for the storage of coals. It was contended for the defendant, that no damages were due, because the two parties had not in contemplation the same results from the breach, but the Court held this an inadmissible construction of the rule in *Hadley v. Baxendale*;<sup>1</sup> that the true rule is that the vendor is always bound for such damages as result from the buyer's being deprived of the ordinary use of the chattel; but is not bound for the further special damage that the buyer may suffer, by being debarred from using it for some special and unusual purpose, not made known to the vendor, when he contracted for the delivery.

In *Brady v. Oastler*,<sup>2</sup> the Barons of the Exchequer decided (Martin, B., *diss.*), that in an action for damages for non-delivery of goods at a specified time, under a written contract, parol evidence was inadmissible to show, with a view to estimate the damages, that the price fixed in the contract had been enhanced above the market value in consideration of the vendor's being allowed an unusually short time for the manufacture and delivery of the articles.

In *Smeed v. Foord*,<sup>3</sup> the defendant had contracted to furnish a steam threshing engine on a day fixed, which was wanted, as he knew, for the purpose of threshing the plaintiff's wheat in the field, so that it could be sent at once to market. He failed to deliver the engine in time, and the plaintiff was obliged to carry the wheat home and stack it. The wheat was injured by the weather, and it was necessary to kiln-dry a part of it, and its market value was deteriorated. Held, that the defendant was responsible for these damages.

<sup>1</sup> 9 Ex. 341; 23 L. J., Ex. 179.

<sup>2</sup> 1 E. & E. 602; 28 L. J., Q. B. 178.

<sup>3</sup> 3 H. & C. 112; 33 L. J., Ex. 300.

In *Borries v. Hutchinson*,<sup>1</sup> the plaintiff had bought from defendant 75 tons of caustic soda, deliverable in three equal parts, in June, July, and August. The vendor knew that the soda was bought for sale on the Continent, and was to be shipped from Hull, and also knew before the end of August that it was to be shipped to Russia; but there was no evidence that the vendor knew this last fact at the time of making the contract. The buyer, at the time when he contracted for the purchase, made a like contract for resale, at a profit, to a St. Petersburg merchant. The latter, in his turn, made a sub-sale, at a profit, in St. Petersburg. None of the soda was delivered till between the 16th September and 26th October, when a portion of it was received by the plaintiff in Hull, and shipped to St. Petersburg, at which season the rates of freight and insurance are always raised, so that plaintiff was put to increased cost in making delivery. The soda was an article manufactured by the vendor, and there was no market in which the buyer could have supplied himself at the date of the breach, so as to be able to perform his contract of resale. The plaintiff had paid 159*l.* to his vendee in St. Petersburg as damages for non-delivery to him, and for his loss of profit on his sub-sale. Held, that the buyer was entitled to recover as damages his lost profits on the resale, and all his additional expenses for freight and insurance, but not the damages paid to his vendee for the latter's loss on the sub-sale, those being too remote.

Rule of damages not applicable where there is no market for the goods.

*Borries v. Hutchinson.*

The ground on which the measure of damages in this case was held to form an exception to the general rule was, that there was no market in which the buyer could have replaced the soda at the time fixed for the delivery, so as to bring it within the principle on which the rule is based, namely, that the disappointed buyer can go into the market with the money which he had prepared for paying the first

<sup>1</sup> 18 C. B., N. S. 445; 34 L. J., C. P. 169. See, also, *Wilson v. Lancashire and Yorkshire Railway Com-* pany, 9 C. B., N. S. 632; 30 L. J., C. P. 232.

vendor, and replace the goods, subject only to damages arising out of the difference in price.<sup>1</sup>

Loss of profits  
on sub-sale.  
*Williams v.*  
*Reynolds.*

But in *Williams v. Reynolds*<sup>2</sup> it was held that the buyer could not recover as damages the profit that he would have gained by delivering the goods under a resale made by him before the time appointed for the performance of his vendor's contract; and that the damages must be assessed according to the market value at the date of the breach; and Crompton, J., said that the Common Pleas, in deciding *Borries v. Hutchinson*, must be taken to have considered the sub-contract as contemporaneous, and known to the defendant at the time of his making his contract.

*Randall v.*  
*Roper.*

In *Randall v. Roper*,<sup>3</sup> however, which was for damages for breach of warranty, and will therefore be considered in the next chapter, the liability of the buyer for damages to sub-vendees was taken into consideration in estimating his damages against the first vendor.

*Dunlop v.*  
*Higgins.*

It may be useful to the reader, before leaving this branch of the subject, to point out that, in the case of *Dunlop v. Higgins*,<sup>4</sup> where it was decided that the purchaser might recover as damages any profit that he would have made on a resale, without reference to the market value at the time of the breach, the decision went exclusively on the Scotch authorities as showing what was the law of Scotland where the contract was made, and the case is not an authority on the English law, although the rule of the English Courts was mentioned with severe disapproval by Lord Cottenham.<sup>5</sup>

Where goods  
are deliverable  
to buyer "on  
request."

If the contract which has been broken provided for the delivery of the goods to the buyer on request, it is a condition precedent to the buyer's right of action that he should

<sup>1</sup> See, on this point, *O'Hanlan v. Great Western Railway Company*, 6 B. & S. 484; 34 L. J., Q. B. 154; *Rice v. Baxendale*, 7 H. & N. 96; 30 L. J., Ex. 371.

<sup>2</sup> 34 L. J., Q. B. 221; and see, *Gee v. Lancashire and Yorkshire Railway Company*, 6 H. & N. 211; 30 L. J., Ex. 11; *Great Western Railway Company v. Redmayne*, L. R. 1, C.

P. 329; *Portman v. Middleton*, 4 C. B., N. S. 322; 27 L. J., C. P. 231; *Mayne on Damages*, p. 18.

<sup>3</sup> E. B. & E. 84; 27 L. J., Q. B. 266.

<sup>4</sup> 1 H. of L. Cases, 381.

<sup>5</sup> See the remarks on this case in *Mayne on Damages*, p. 18, quoted and approved by the judges in *Williams v. Reynolds*, 34 L. J., Q. B. 221.

make this request either personally or by letter, unless there has been a waiver of compliance with this condition, resulting from the vendor's having incapacitated himself from complying with the request by consuming, or reselling, or otherwise so disposing of the goods as to render a request idle and useless,<sup>1</sup> as heretofore explained in the Chapter on Conditions.<sup>2</sup>

If the buyer is unable to prove the existence of any actual damage resulting from the non-delivery, he will nevertheless be entitled to recover nominal damages,<sup>3</sup> on the general principle that every breach of contract imports some damage in law.

Where no damages proved nominal damages recoverable.

It must not be forgotten that even after the goods have been sent to the buyer, in the performance of an executory contract, his right of rejecting them is unaffected by the actual delivery to him, until he has had a reasonable opportunity of inspection and examination, as shown *ante*, p. 519, in the Chapter on Acceptance.

#### SECTION II.—WHERE THE PROPERTY HAS PASSED.

Where the contract which has been broken by the vendor is one in which the property has passed to the buyer, there arise in favour of the latter the rights of an owner; of one who has not only the property in the goods, but the *right of possession*, defeasible only on his own default in complying with his duty of accepting and paying for them. A buyer in this condition has of course the right of action for damages for breach of the contract, discussed in the preceding section; for that is a right common to all parties to contracts of every kind, and was formerly the *only* remedy at common law for such breach.

Buyer had no other remedy at common law but action for damages.

In equity, however, the Courts would in certain cases compel the vendor to deliver the specific chattel sold, and

But equity would sometimes enforce specific performance.

<sup>1</sup> *Bach v. Owen*, 5 T. R. 409; *Radford v. Smith*, 3 M. & W. 254; *Bowdell v. Parsons*, 10 East, 359; *Amory v. Brodrick*, 5 B. & Ald. 712.

<sup>2</sup> *Ante*, p. 423.

<sup>3</sup> *Valpy v. Oakeley*, 16 Q. B. 941; 20 L. J., Q. B. 380; *Griffiths v. Perry*, 1 E. & E. 680; 28 L. J., Q. B. 204.

the cases on the subject are collected in the first volume of White and Tudor's Leading Cases in Equity,<sup>1</sup> where the rule as deduced from the authorities is stated in these words: "The question in all cases is this,—Will damages at law afford an adequate compensation for breach of the agreement? If they will, there is no occasion for the interference of equity; the remedy at law is complete: if they will not, specific performance of the agreement will be enforced."<sup>2</sup>

Rule in equity.

Specific performance now allowed at law by Mercantile Law Amendment Act.

But now, by the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 2), it is provided, that "in all actions for breach of contract to deliver specific goods for a price in money, on application of the plaintiff, and by leave of the judge before whom the cause is tried, the jury shall, if they find the plaintiff entitled to recover, find by their verdict what are the goods in respect of the non-delivery of which the plaintiff is entitled to recover, and which remain undelivered; what, if any, is the sum the plaintiff would have been liable to pay for the delivery thereof; what damages, if any, the plaintiff would have sustained if the goods should be delivered under execution as hereinafter mentioned, and what damages if not so delivered; and thereupon, if judgment shall be given for the plaintiff, the Court or any judge thereof, at their or his discretion, on the application of the plaintiff, shall have power to order execution to issue for the delivery,—on payment of such sum, if any, as shall have been found to be payable by the plaintiff as aforesaid,—of the said goods, without giving the defendant the option of retaining the same upon paying the damages assessed."

Buyer may also maintain trover.

The buyer to whom the property has passed may, if not in default, maintain an action in trover for damages for the conversion, on the vendor's refusal to deliver, as well as

<sup>1</sup> In notes to Cuddee v. Rutter, p. 715, 3rd ed.

<sup>2</sup> See, also, opinion of Kindersley V.-C., in Falcke v. Gray, 4 Drew. 658, 29 L. J., Ch. 28, in which he

held that a contract for the purchase of articles of unusual beauty, rarity, and distinction, such as objects of vertu, will be specifically enforced.

an action on the contract; but he cannot recover greater damages by thus suing in tort, than by suing on the contract. If, therefore, the vendor's conversion was before delivery, so that he cannot maintain an action for the price, as if he has resold the goods to a third person, the damages recoverable would be only the difference between the contract price and the market value.<sup>1</sup> But if the vendor's right of action for the recovery of the price were not thus lost, as if he had delivered the goods and afterwards tortiously retaken and converted them, the buyer's right of recovery in trover would be for the whole value, and the vendor would be driven to his cross action for the price.<sup>2</sup> The subject has already been discussed, in the examination of the Vendor's right of Resale, in Part I., Chap. 3, of this Book.

Rule of damages for conversion by vendor before delivery.

After delivery.

After the property in the specific chattel has passed to the buyer, it may happen that he discovers the goods bought to be different in kind or quality from that which he had a right to expect according to the agreement. In such case it is necessary to distinguish whether the defect be one in the performance of a condition or of a warranty. In the former case he may refuse to accept the goods and reject the contract, but not in the latter.

Buyer's right to refuse the goods offered.

The reason for this difference is, that in the one case, the contract itself depends on the performance of the condition precedent incumbent on the vendor, while in the other the principal contract has been performed, and the breach is only of the collateral undertaking of warranty.

If the goods sold are not of the description which the buyer agreed to purchase, he may reject them, as explained *ante*, pp. 442, *et seq.*, in the chapter on Conditions, where the cases are cited and reviewed.

He may refuse the goods if not of the description agreed on.

But where the property in the goods has passed to the buyer, *unconditionally*, the law gives him no right to rescind the contract in the absence of an express stipulation to that

He cannot reject them for breach of warranty of quality.

<sup>1</sup> *Chinery v. Viall*, 5 H. & N. 288 ;  
29 L. J., Ex. 180.

<sup>2</sup> *Gillard v. Brittan*, 8 M. & W. 575.



effect, and the property therefore remaining in him, he is bound to pay the price even if he reject the goods, which still remain his.<sup>1</sup> His proper remedy, therefore, is to receive the goods, and to exercise the rights explained in the next chapter.

Heyworth v.  
Hutchinson.  
Buyer held  
bound to ac-  
cept goods even  
in an executory  
contract, al-  
though not  
equal to war-  
ranty.

In the recent case of *Heyworth v. Hutchinson*,<sup>2</sup> the buyer was held bound to accept the goods, *although the property had not passed to him, although he had not had an opportunity of inspection before purchase, and although the goods were much inferior in quality to the warranty in the written contract*. The case turned on the meaning of the written contract; but the *dicta* of the judges would seem to imply that the same decision would be given in the case of any contract for the sale of specific goods. The defendant bought a quantity of wool, "413 bales greasy Entre Rios, at 10½*d.* per pound, to arrive ex Stige, or any vessel they may be transhipped in, and subject to the wool not being sold in New York, before advice reaches the consignees to send the wool forward here. The wool to be guaranteed about similar to samples in Perkin's and Robinson's possession, and if any dispute arises it shall be decided by the selling brokers, whose decision shall be final, &c."

On arrival it was found by the brokers that 180 bales were not as good as the original samples by 2*d.* a pound; 201 bales not as good by 1½*d.* a pound; and 32 bales not as good by ½*d.* per pound. The buyer on inspecting the wool refused to take it, and after due notice to, and under protest from him, the brokers awarded that he should take it at the above allowances. The second count of the declaration alleged this decision of the brokers as an *award after due arbitration*. One of the brokers deposed at the trial that the wool was not "about similar to samples," and that

<sup>1</sup> *Street v. Blay*, 2 B. & Ad. 456; *Gompertz v. Denton*, 1 C. & M. 205; *Poulton v. Lattimore*, 9 B. & C. 259; *Parsons v. Sexton*, 4 C. B. 899; *Dawson v. Collis*, 10 C. B. 530; *Cutter v. Powell*, in notes, 2 Sm., L. C. 26. Lord Eldon's decision to the contrary, in *Curtis v. Hannay*, 3 Esp. 83, is overruled by the later cases.  
<sup>2</sup> L. R. 2, Q. B. 447; 36 L. J., Q. B. 270.

was the reason for making the allowances. The defendant was held bound to accept under the award. Among the *dicta*, however, were the following, some of which, if taken literally, go farther, it is submitted, than has yet been determined by any direct authority.

Cockburn, C. J., said: "This contract is for the sale of specific wools to arrive by a particular ship; they are earmarked so as to prevent the contract applying to any other wools; and they are guaranteed as about similar to samples. If the matter stood there, *this being a sale of specific goods, though with a warranty, there would not be any right or power on the part of the buyer to reject the goods on the ground of their not being conformable to the samples*; but the buyer's remedy would be either by a cross action on the warranty, or by giving the inferiority in evidence in reduction of damages."

Blackburn, J., put his judgment on the ground of the written contract, and said as to the clause of warranty: "Now such a clause may be a simple guarantee or warranty, or it may be a condition. Generally speaking, when *the contract is as to any goods*, such a clause is a *condition* going to the essence of the contract; but when the contract is as to *specific goods*, the clause is only collateral to the contract, and is the subject of a cross action, or matter in reduction of damages."

Lush, J., said: "This was not a contract to supply *any* goods answering the description, but a contract to *sell specific goods*, with a warranty of their being about similar to sample; and *clearly by the general law there was no power in the buyer to reject them*, because they did not answer the description."

When *Heyworth v. Hutchinson* was cited in *Azémar v. Casella*,<sup>1</sup> Blackburn, J., said that the decision was quite consistent with the judgment in the latter case, because "the wool which arrived was of the same kind or character as that contracted for, but inferior only in quality."

<sup>1</sup> L. R. 2, C. P. 677, in *Cam. Scacc.*; 36 L. J., C. P. 263.

Remarks on  
the *dicta* in  
this case.

It is very difficult to understand the reason for the distinction suggested in the above *dicta* of the eminent judges of the Queen's Bench if intended to apply to cases where the specific chattels have never been in a condition to be inspected by the buyer, and where *the property has not passed to him*. The cases in which it has been held that on the sale of a specific chattel, the buyer's remedy is confined to a cross action or to a defence by way of reduction of the price, are all cases of the *bargain and sale* of a specific chattel *unconditionally*, where, consequently, the property had become vested in the buyer; but no similar case of an *executory contract* has been found; no case in which the buyer has been held bound to accept goods which required to be weighed before delivery, and in which, therefore, the property remained in the vendor, if they were not equal in quality to the sample by which they were bought.

In justice and principle there seems to be no difference between a vendor's saying, "I will sell you 100 bales of wool at 10*d.* a pound, warranted equal to this sample," and his saying, "I will sell you 100 bales of wool marked with my name, which I have on board the ship *Stige*, now at sea, at 10*d.* a pound, warranted equal to this sample." Why should the vendor have the right to reject the goods, if inferior in quality to the sample, in the former case, and not in the latter? In neither instance has he an opportunity to inspect, and in neither does the reason exist on which the opinion rested in *Street v. Blay*,<sup>1</sup> where the Court specially put the doctrine on the ground that the property had passed. The language is as follows: "Where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and *revest the property in the vendor*, \* \* \* but must sue upon the warranty unless there has been a condition in the contract authorising the return, or the vendor has received back the chattel, and has thereby consented to

<sup>1</sup> 2 B. & Ad. 456.

rescind the contract. \* \* \* It is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, *revest the property in the seller* and recover the price, when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot by the same means protect himself from the payment of the price on the same ground. \* \* \* It is to be observed that although the vendee of a specific chattel *delivered with a warranty*, may not have a right to return it, *the same reason does not apply to the cases of executory contracts*, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. \* \* \* *Nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk which may not agree with it.*"

In every one of the cases cited in the books as authority for the proposition that the buyer cannot refuse acceptance of a specific chattel sold, on the ground of breach of warranty of quality, the contract was a *bargain and sale*, and the property in the specific chattel had passed.<sup>1</sup>

In *Toulmin v. Hedley*,<sup>2</sup> it was held by Cresswell, J., that the purchaser of a *specific cargo* of guano had a right to inspect it on arrival and reject it, if not equal in quality to "average imports from Ichaboe" as warranted; and in *Mondel v. Steel*,<sup>3</sup> the well-considered opinion of the Court, as delivered by Parke, B. (*post*, p. 682), gives as the reason why a purchaser is driven to a cross-action on a warranty, "that the property has vested in him indefeasibly."

It is submitted, therefore, that the *dicta* of the learned judges, in *Heyworth v. Hutchinson*, must be taken as refer-

<sup>1</sup> *Weston v. Downes*, Doug. 23; 116; *Payne v. Whale*, 7 East, 274; *Gompertz v. Denton*, 1 C. & M. 207; *Cutter v. Powell*, 2 Sm., L. C. 26, and *Murray v. Mann*, 2 Ex. 538; *Parsons v. Sexton*, 4 C. B. 899; *Dawson v. Collis*, 10 C. B. 523; 20 L. J., C. P. notes.

<sup>2</sup> 2 C. & K. 157.

<sup>3</sup> 8 M. & W. 858.

*Toulmin v. Hedley.*

ring to cases of *bargain and sale*, not to *executory contracts*,<sup>1</sup> unless there be something in the terms of the agreement to show that the buyer had consented to take the goods at a reduced price, if they turned out to be inferior to the quality warranted.

<sup>1</sup> The learned editor of the last edition of Chitty on Contracts seems to take a different view.—p. 425.

## CHAPTER II.

### AFTER RECEIVING POSSESSION OF THE GOODS.

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AFTER the goods have been delivered into the actual possession of the buyer, the performance of the vendor's duties may still be incomplete by reason of the breach of some of the warranties, express or implied, whether of title or quality, to which he has bound himself by the contract.

If the breach be of warranty of title, the buyer may either bring his action for the return of the price on the ground of failure of the consideration for which the price

Breach of warranty of title.

was paid, as in *Eichholz v. Banister*, *ante*, 472, or he may sue in damages for breach of the vendor's promise as in all other cases of breach of contract.

Breach of warranty of quality.

Three remedies.

Where the goods delivered to the buyer are inferior in quality to that which was warranted by the vendor, the buyer has the choice of three remedies:—

*First.* He may refuse to accept the goods, and return them, except in the case of a specific chattel in which the property has passed to him, as explained in the preceding chapter.

*Secondly.* He may accept the goods and bring a cross-action for the breach of the warranty.

*Thirdly.* If he has not paid the price, he may plead the breach of warranty in reduction of the damages in the action brought by the vendor for the price.

1st. Right to reject the goods.

That the buyer, *where the property has not passed to him*, may reject the goods if they do not correspond in quality with the warranty seems to be the necessary result of the principles established heretofore in the chapters on Delivery and Acceptance. The buyer's obligation to accept depends on the compliance by the vendor with his obligation to deliver. In an executory agreement for sale with a warranty of quality, as, for example, in a sale by sample, it is part of the vendor's promise to furnish a bulk equal in quality to the sample; and in general this must operate as a condition precedent. If the buyer has inspected goods, and agreed to buy them, it may, perhaps, be inferred that a warranty of quality is an independent contract, collateral to the principal bargain, and only giving rise to a cross-action for the breach, *ante*, pp. 420, *et seq.* But where the buyer has agreed to buy goods that he has never seen, nor had an opportunity of inspecting, on the vendor's warranting that they are of a specified quality, nothing seems clearer than that this warranty is not an independent contract, but is a part of the original contract, operating as a condition, and that what the buyer intends when accepting the offer is, "I agree to buy if the goods are equal to the quality you warrant." Accordingly the learned author of the *Leading Cases* thus

expresses the rules deduced from the authorities:<sup>1</sup> "A warranty, properly so called, can only exist where the subject-matter of the sale is ascertained and existing, *so as to be capable of being inspected at the time of the contract*, and is a collateral engagement that the specific thing so sold possesses certain qualities, but the property passing by the contract of sale, a breach of the warranty cannot entitle the vendee to rescind the contract and revest the property in the vendor without his consent. \* \* \* But where the subject-matter of the sale is not in existence, or not ascertained at the time of the contract, an engagement that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because *the existence of those qualities being part of the description of the thing sold becomes essential to its identity*, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted." The same reasoning which applies to a thing not yet existing, or not yet ascertained, would seem equally applicable to goods in a distant country, or on the high seas, beyond the possible reach of the buyer's inspection.

In the absence of some such express stipulation as was contained in *Heyworth v. Hutchinson*, *ante*, p. 674, it is therefore a complete defence for the buyer to show that in such a sale the delivery offered was not in accordance with the promise.<sup>2</sup> And the buyer may even reject the goods, if the vendor refuses him an opportunity for inspection when demanded at a reasonable time, although the vendor, a few days afterwards, offers them for inspection; as was decided in *Lorymer v. Smith*, *ante*, p. 441.

In actual practice, the only difficulty which arises in these cases grows out of controversies whether the buyer has actually accepted the goods and thus become owner. On this point the cases show that acceptance does not take place by mere retention of the goods for the time necessary

<sup>1</sup> Vol. II., p. 27.

*Sanders v. Jameson*, 2 C. & K. 557;

<sup>2</sup> *Street v. Blay*, 2 B. & Ad. 456; *Cooke v. Riddellien*, 1 C. & K. 561.



to examine or test them, nor by the consumption of so much as is necessary for such examination and testing; and it is always a question of fact for the jury, whether the goods were kept longer, or whether a larger quantity was consumed than was requisite to enable the buyer to decide whether he would accept or reject.<sup>1</sup>

The buyer's  
action for da-  
mages after  
goods have been  
accepted.

The *second* proposition, that the buyer may, after receiving and accepting the goods, bring his action for damages, in case the quality is inferior to that warranted by the vendor, needs no authority. It is taken for granted in all the cases, there being nothing to create an exception from the general rule, that an action for damages lies in every case of a breach of promise made by one man to another, for a good and valuable consideration.

The buyer's  
right to plead  
breach of war-  
ranty in dimi-  
nution of price.  
Mondell v.  
Steel.

The *third* remedy of the buyer, with an exposition of the whole law on the subject, cannot be better presented than by extracts from the lucid decision given, in behalf of the Exchequer of Pleas, by Parke, B., in *Mondell v. Steel*.<sup>2</sup> In that case the action was by the buyer for damages for breach of an express warranty in the quality of a ship built under written contract. The defendant pleaded in effect, that the buyer had already recovered damages by setting up the breach of warranty in defence when sued for the price of the ship. The damages claimed in the declaration were special, and were alleged to result from defects in the fastenings, whereby the vessel was so much strained, as to require refastening and repair, so that the plaintiff was deprived of the use of the vessel while undergoing the repairs. A general demurrer to the plea was sustained, and *per cur.* "Formerly it was the practice, where an action was brought for an agreed price of a specific chattel sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty; in which action, as well the difference between the price contracted for, and the real value of the articles or of the

<sup>1</sup> See the cases reviewed, *ante*, pp. 441-2.

<sup>2</sup> 8 M. & W. 858.

work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant who received the chattel warranted, has thereby *the property vested in him indefeasibly, and is incapable of returning it back*; he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of *Basten v. Butter*,<sup>1</sup> a different practice began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel, by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value. \* \* \*

The rule is, that it is competent for the defendant, *not to set-off by a procedure in the nature of a cross-action*, the amount of damages which he has sustained by breach of the contract, but simply *to defend himself by showing how much less the subject-matter of the action was worth*, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action *to that extent, but no more*."

This case is the leading case now always cited for establishing—

*First.* That the buyer may set up the defective quality of the warranted article in diminution of the price; and,

<sup>1</sup> 7 East, 479.

But must bring cross-action for special damages.

Cross-action not barred by previously pleading the breach of warranty in defence.

*Poulton v. Lattimore.*

Buyer relieved from paying any part of the price.

Buyer may defend or bring action for breach of warranty without returning the goods, or giving notice to vendor.

But his failure to do so raises a presumption against him.

*Adams v. Richards.*

Where vendor has agreed to take back the chattel if found faulty it must be returned as soon as defect is found.

Buyer loses his right of returning goods by

*Secondly.* That he must bring a cross-action, if he desires to claim special or consequential damages, which action is not barred by reason of his having obtained a diminution of price in a previous action brought by his vendor.<sup>1</sup>

In *Poulton v. Lattimore*,<sup>2</sup> the buyer's defence in an action for the price was successful for the *whole amount of the price*. The vendor sued to recover the price of seed, warranted to be good new growing seed, part of which the buyer had sowed himself, and the remainder was sold to two other persons, who proved that the seed was worthless; that it had turned out to be wholly unproductive; and that they had neither paid, nor would pay for it.

It was further held in this case, that the buyer might insist on his defence without returning, or offering to return the seed. And the cases cited in the note are authorities to the effect, that not only may the breach of warranty be so used in defence, but that a direct action by the buyer may be maintained for damages for the breach, without notice to the vendor.<sup>3</sup>

It has been said, however, by eminent judges, and the jury at the trial would no doubt be told, that the failure either to return the goods, or to notify the vendor of the defect in quality, raises a strong presumption that the complaint of defective quality is not well founded.<sup>4</sup>

In *Adams v. Richards*,<sup>5</sup> the Common Pleas held, that where a horse had been sold with express warranty and an agreement to take him back if found faulty, it was incumbent on the purchaser to return the horse *as soon as the faults were discovered*, unless the seller by subsequent misrepresentation induced the purchaser to prolong the trial.

The buyer will also lose his right of returning goods delivered to him under a warranty of quality, if he has

<sup>1</sup> See also *Rigge v. Burbidge*, 15 M. & W. 598; *Cutter v. Powell*, 2 Sm., L. C., notes, p. 26.

<sup>2</sup> 9 B. & C. 259.

<sup>3</sup> *Fielder v. Starkin*, 1 H. Bl. 17; *Pateshall v. Tranter*, 3 A. & E. 103; *Buchanan v. Parnshaw*, 2 T. R. 745.

<sup>4</sup> *Per* Lord Ellenborough, in *Fisher v. Samuda*, 1 Camp. 190; *per* Lord Loughborough, in *Fielder v. Starkin*, *supra*; *Poulton v. Lattimore*, 9 B. & C. 259; *Prosser v. Hooper*, 1 Moore, 106.

<sup>5</sup> 2 H. Bl. 573.

shown by his conduct an acceptance of them, or if he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, or has exercised acts of ownership, as by offering to resell them; all of which acts show an agreement to accept the goods,<sup>1</sup> but do not constitute an abandonment of his remedy by cross-action, or his right to insist in defence upon a reduction of price.<sup>2</sup>

any act equivalent to acceptance,

but not his other remedies.

The buyer's right to insist on a reduction of price on the ground of breach of warranty cannot be made available if he has given a negotiable security for the price, and the action is brought on the security. He is driven in such a case to a cross-action as his only remedy. The reason is that the law does not permit an unliquidated and uncertain claim to be set up in defence against the liquidated demand represented by a bill or note.<sup>3</sup>

Buyer cannot set up breach of warranty in defence to a negotiable security given for the price.

In relation to the measure of damages which the buyer is entitled to recover for breach of warranty, the rules are substantially the same as those which govern in the case of the vendor's breach of his obligation to deliver.

Measure of damages on breach of warranty.

In *Dingle v. Hare*,<sup>4</sup> cited *ante*, p. 463, it was held that the jury had properly allowed the purchaser the difference of value between the article delivered and the article as warranted. And in *Jones v. Just*,<sup>5</sup> cited *ante*, p. 485, the same rule was applied, and the plaintiff recovered as damages 756*l.*, although by reason of a rise in the market the inferior article sold for nearly as much as the price given in the original sale.

*Dingle v. Hare.*

*Jones v. Just.*

In *Lewis v. Peake*,<sup>6</sup> the buyer of a horse, relying on a warranty, resold the animal with warranty, and being sued by his vendee, informed his vendor of the action, and offered him the option of defending it, to which offer he received no answer,

*Lewis v. Peake.*

<sup>1</sup> *Ante*, pp. 519, *et seq.*

<sup>2</sup> *Mondell v. Steel*, 8 M. & W. 858; *Street v. Blay*, 2 B. & Ad. 456; *Allen v. Cameron*, 1 C. & M. 832.

<sup>3</sup> See the exposition of the law, and citation of authorities, in Byles on Bills, p. 126, 9th ed.; Agra &

*Masterman's Bank v. Leighton*, L. R. 2, Ex. 56; 36 L. J., Ex. 33.

<sup>4</sup> 7 C. B., N. S. 145; 29 L. J., C. P. 144.

<sup>5</sup> L. R. 3, Q. B. 197; 37 L. J., Q. B.

<sup>6</sup> 7 Taunt. 153.

Buyer may recover the costs of defence against his sub-vendee in certain cases.

Randall v. Raper.

Buyer may recover damages which he is liable to pay to sub-vendees.

and thereupon defended it himself, and failed. The Common Pleas held that the costs so incurred were recoverable as special damages against the first vendor.

In *Randall v. Raper*,<sup>1</sup> the plaintiffs had bought barley from the defendant as Chevalier seed barley, and in their trade as corn-factors resold it with a warranty that it was such seed barley. The sub-vendees sowed the seed, and the produce was barley of a different and inferior kind, whereupon they made claim upon the plaintiffs for compensation, which the plaintiffs had agreed to satisfy, but no particular sum was fixed, and nothing had yet been paid by the plaintiffs. The difference in the value of the barley sold by the defendant, and the barley as described, was 15*l.*, but the plaintiffs recovered 261*l.* 7*s.* 6*d.*, the excess being for such damages as the plaintiffs were deemed by the jury liable to pay to their sub-vendees. All the judges of the Queen's Bench held the damages to the sub-vendees to be the necessary and immediate consequence of the defendant's breach of contract, and properly recoverable. Wightman, J., however, expressed a doubt whether these damages were recoverable before the plaintiffs had actually paid the claims of their sub-vendees, but declined to dissent from his brethren on the point.

<sup>1</sup> E. B. & E. 84; 27 L. J., Q. B. 266.

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